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ARTICLES

In 1997, the Peoples Republic of China (PRC) will resume the "exercise of sovereignty" over the British Crown Colony of Hong Kong. For the next 50 years Hong Kong will function as a "Special Administrative Region" (SAR) of the PRC. The SAR of Hong Kong and the PRC are going to attempt the perhaps unprecedented governing model of "one country, two systems." This presents a unique opportunity for experimentation in comparative constitutional law. One of the most critical issues in the transition of rule is how the constitution, or Basic Law, of Hong Kong will function within the framework of the government of the PRC. The author explores various theories of constitutional systems and federal states and advocates a system of judicial review for Hong Kong's new Basic Law as the system best suited to facilitating the assimilation of Hong Kong into the PRC.

This article traces the political and legislative history of the War Powers Resolution, enacted in 1973. It also details the history of the Presidential War Power from the Articles of Confederation to the present day, tracing its conflict with Congress and the judiciary through the Federalist Papers, the Vietnam War, and *I.N.S. v. Chadha*. The focus of the article is the Constitutionality of the War Power and the War Powers Resolution as examined through the original intent of the Founding Fathers, particularly in the construction of the terms *declaration* of war and *make* war. The article then examines the constitutional division of the war-related powers of the Congress, the President, the Commander-in-Chief, Foreign Policy, and case law from the inception of the Constitution. The article concludes by examining the effect of the War Powers Resolution on U.S. Foreign policy and analysing its implications for the future given the Resolution's mandate for Congress for unconstitutional infringement on the Chief Executive's war powers.

This article examines the claim of the Provisional Irish Republican Army to be an army of national liberation. The author assesses the legitimacy of this claim against the norms and principles of public international law. The I.R.A. itself asserts not only a moral right to use violence but also a legal right, expressly invoking recognized principles of international law to validate its actions. The author rejects these claims by the I.R.A., pointing out that the I.R.A. of 1987 is not the same organization as the I.R.A. (Irish

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A Common Law Court in a Marxist Country: The Case For Judicial Review in the Hong Kong SAR

MICHAEL C. DAVIS*

I. INTRODUCTION

Participants from Hong Kong and the People's Republic of China (PRC) have embarked on a Basic Law drafting process aimed at producing a constitution or Basic Law for the future capitalist Hong Kong Special Administrative Region (SAR) in Marxist China. This Basic Law is required by the Joint Declaration on the future of Hong Kong agreed to between the PRC and the United Kingdom in late 1984.[1] The Joint Declaration stipulates many of the basic policies of the future Basic Law and articulates an initial framework for China's policy of "one country, two systems", under which Hong Kong is to enjoy "a high degree of autonomy."[2] With the first draft of the Basic Law now completed, some attention to the appropriate process for its implementation is timely. This issue has emerged as one of the central issues in the ongoing Basic Law discussion. For a comparative constitutional lawyer, examination of this issue in the unique Hong Kong SAR context affords a rich opportunity for applied comparative constitutional law.

The economic and political stakes in the Hong Kong endeavor are enormous. Hong Kong's nearly six million people certainly have the most immediate interest in the success of the endeavor. The intensity of the debate over the Basic Law in Hong Kong reflects this concern. The stakes for China in the success of its Hong Kong policy are also considerable. Hong Kong is ranked third or fourth among the world's leading financial centers and could well become China's leading financial center in the next century. Hong Kong's container port is also among the world's largest and a considerable portion of China's trade passes through Hong Kong and China has a considerable investment there. Hong Kong's collapse would at a minimum be a major financial blow to China. Yet one suspects the stakes are much larger than the mere loss of the Hong Kong investment.

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1. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, (hereinafter "Joint Declaration"). *Reprinted in* 23 I.L.M. 1366 (1984).

2. *Id.* para. 3(2).

Continued confidence in China's economic policies may also hinge on China's demonstrated commitment to the "one country, two systems" policy. China faces a fragile question of confidence both in Hong Kong and at home. Taiwan's future leaders are no doubt watching this process as well, as they contemplate China's overtures towards unification.

With so much at stake, concern over continued economic and political stability in Hong Kong has become a central issue in the Basic Law drafting discussions. Hong Kong's calls for democracy, direct elections and universal franchise have been met with Chinese resistance to party politics and claims to go slow in democratic reform.[3] While generally acknowledging the Joint Declaration's commitment to democracy, human rights, and liberal capitalism, the Chinese have appeared cautious on political reforms in Hong Kong, fearing resultant instability. With so much at stake, China's reluctance to relinquish too much control appears understandable, and yet this reluctance threatens to produce the very instability and lack of confidence they seek to avoid. With a stable and healthy Hong Kong as the objective, the problem for China may be one of nurturing the baby without holding it to close.

With reference to implementing the Basic Law, discussions on the appropriate process for its interpretation and application have begun to take shape. Proposals have ranged from vesting the primary power to interpret the Basic Law in the Standing Committee of the National People's Congress (NPC), to vesting such power exclusively in the Hong Kong courts.[4] For a constitutional lawyer, a comparative look at the concept of constitutional judicial review appears relevant to this discussion. Constitutional judicial review refers to vesting in appropriate courts the power to determine whether legislation conforms to the imperatives of the constitution or basic law. This includes the power to interpret the Basic Law in order to determine its requirements.[5]

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3. *See infra* notes 7-27 and accompanying text.

4. *See infra* notes 18-27.

5. While Hong Kong's current colonial government is constituted under certain Letters Patent and Royal Instructions, these documents contain no bill of rights component, and Hong Kong has had no experience with constitutional judicial review of legislation. Historically, a more important conceptual limitation on the legislature may have been the enormous powers of the colonial governor. It should be stressed that, while Hong Kong courts have not historically asserted any power to throw out legislation for offending the Letters Patent and Royal Instructions, such courts have, in contexts other than review of legislation, asserted a power to construe the meaning of the constitutional documents and have a limited experience with other forms of review of legislation. *See infra* note 96. Constitutional judicial review, while being a new addition within the more elaborate future constitutional framework, would thus be consistent with the existing Hong Kong experience. With these important distinctions it is generally true that by legal training and practice, Hong Kong has largely (with limited exception) shared the British unwritten constitutional tradition of legislative supremacy. While Annex 1, Article II of the Joint Declaration calls for continuance of Hong Kong's current laws, it appears that the implementation of a written basic law with a bill of rights component will inherently cause fundamental change for which there will be no adequate recourse to the present system. *See generally*, Chen, *The Basic Idea of*

This essay will examine the contextual imperatives of the Hong Kong Basic Law debate and the various proposals put forth with respect to interpreting and applying the future Hong Kong SAR Basic Law. A starting point for this examination is the imperatives evident in the Joint Declaration, as well as those reflected in the aspirations and perspectives of the participants in the Basic Law drafting process. This will be followed by a comparative examination of the concept of constitutional judicial review, both from a theoretical and a structural perspective. With the aim of highlighting relevant features of this comparative constitutional experience, a proposed model for Hong Kong will then be offered.

It is hoped that this analysis will make a contribution, not only to the ongoing Hong Kong Basic Law debate, but more generally, to comparative analysis of constitutional implementation. Improved analysis may assist us in judging the reliability of such efforts at constitutionalism. Judgments of such nature will certainly be made by the world community at large with respect to the reliability of the final product in Hong Kong.

A. The Basic Law in Context

An examination of the process for implementing the Basic Law should begin with the Joint Declaration, by considering its imperatives with respect to constitutional judicial review, or more generally, with respect to interpreting and applying the Basic Law. While such examination does not provide a clear answer, it does perhaps suggest an appropriate direction. One might well conclude that some form of constitutional judicial review in the Hong Kong SAR courts may better conform to the spirit of the Joint Declaration than would the vesting of such review power largely in the Standing Committee of the NPC. The requirements of "a high degree of autonomy" and the policy of "one country, two systems" alone suggest this much. Yet the language of the Joint Declaration offers more. This language begins by informing us in Paragraph 3 (12) that the basic policies articulated in the Joint Declaration, and the elaboration of them in Annex I, will be stipulated into the Basic Law. These policies include the requirement that a large number of enumerated rights be "protected by law" and afford Hong Kong an "independent judicial power including that of final adjudication."[6]

Annex I to the Joint Declaration affords further elaboration of these policies. Annex I, Article II provides that laws previously in force shall be maintained "save for those that contravene the Basic Law," that the legislature may enact laws "in accordance with the provisions of the Basic Law," and that "laws enacted by the legislature which are in accordance with the Basic Law and legal procedures shall be regarded as valid." Does this latter expression suggest that common law courts, charged with upholding the law, should treat enacted laws that are not in accordance with

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the Basic Law, Wide Angle Magazine, May 16, 1986, at 44-48.

6. Joint Declaration, paras. 3(3) and 3(5).

the Basic Law as invalid? Article II expressly provides for the maintenance of the common law. Does this include the traditional role of common law courts in affording interpretation and otherwise giving life to statutory and Constitutional language?

. Several provisions further specify judicial independence, and Annex I, Article III requires that the judicial power be exercised "independently and free from interference." This clearly suggests the inappropriateness of the courts having to consult another entity on Basic Law issues. Finally, Annex I, Article XIII provides: "Every person shall have the right to challenge the actions of the executive in the courts." Does this include the challenge of executive actions under statutes that violate the Basic Law?

Those who favor vesting in the Standing Committee of the NPC the power to review all Hong Kong legislation for conformity to the Basic Law find support in the reporting requirement of the Joint Declaration and in Article 67 of the PRC Constitution. Annex I, Article II of the Joint Declaration provides: "The legislature may on its own authority enact laws in accordance with provisions of the Basic Law and legal procedures, and report them to the Standing Committee of the National People's Congress for the record." Query whether such reporting "for the record" implies a power of review or "veto". Article 67 of the PRC Constitution affords the Standing Committee the power to interpret PRC legislation which is argued to include the Basic Law. Article 31 of the PRC constitution, however, permits the creation of special systems in SARs and would therefore appear to permit delegation of this interpretation power either in the Joint Declaration or the Basic Law. If such delegation has not clearly been accomplished in the Joint Declaration, then perhaps it should be in the Basic Law. While the Joint Declaration is ambiguous on this point, both its spirit and language appear to favor some form of constitutional judicial review. Any product of the Basic Law drafting process should be judged for conformity to such policies as indicated by the Joint Declaration.

B. Hong Kong Perspectives

In drafting the Basic Law, the PRC government is employing a very elaborate system, embodying both a Basic Law Drafting Committee and a Basic Law Consultative Committee, in a process designed to consult with a large cross-section of the Hong Kong community. Both Hong Kong and mainland participants are included on these committees. Their numbers include both lawyers and laymen. Recommendations for inclusions in the Basic Law have come from many sectors of the Hong Kong community. In selecting committee members, efforts were made to include representatives from these various sectors in conformity with the emerging Hong Kong tradition of functional constituencies. The electoral process for the future SAR has proven a particularly contentious issue. Competing electoral models pit direct elections and universal franchise for selecting the future governor against forms of indirect election employing an electoral

college.[7] Some four proposals have been short-listed for selecting the future legislature.[8] Some have even expressed fears that unless a consensus is reached on the proper political model, China may simply have to dictate the model.[9]

Any proposals specifically addressing the question of interpretation or implementation of the future Basic Law might better be considered in light of more general aspirations of the participants. It may be safe to conclude, from our contemporary look at this new generation of founding fathers, that there are certain shared aspirations for Hong Kong's future. These especially include a strong frequently emphasized commitment to economic and political stability. This motivation tends to animate much of the discussion from all perspectives. Shared aspirations also include agreement to maintain a capitalist economy[10] and to carry on a system of law and government that best facilities Hong Kong's capitalist dynamic. Sustaining a significant degree of political autonomy for Hong Kong is commonly recognized as an important ingredient of this process.[11] The importance of this latter ingredient is emphasized when one considers the reality of having a Marxist developing country take sovereignty over what is in effect a country with a developed capitalist economy.

Yet there are certain fundamental differences in the perspectives that come to the Basic Law drafting table. The elites of Hong Kong have been schooled for well over a century in a conception of governance which sees the government as a somewhat passive umpire, or even a facilitator of private endeavor.[12] This system appears to carry with it a Western,

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7. The two leading proposals for selection of the future SAR chief executive, pit rival groups within the Basic Law Consultative Committee against each other. Draft Basic Law, Hong Kong Special Administrative Region of the People's Republic of China (for solicitation of opinions) (April, 1988) [hereinafter Draft Basic Law]. The so called group of 80, largely representing conservative business interest, favors selection by an electoral college of 600 representatives elected from eleven functional sectors of the community. Twenty members of this group would constitute a nominating committee to propose three candidates. This model is felt to reduce the need for party politics. While this group is smaller than the rival group of 190, it appears to have better relations with Beijing. The rival group of 190 favors universal franchise with direct election of the chief executive. *See* Lueng, *New Formula to Elect Chief Executive*, South China Morning Post, Nov. 5, 1986 at 2, col. 2; Leung, *130 Groups Join Political Reform Lobby*, South China Morning Post, Feb. 5, 1987, at 1, col. 1.

8. These models differ with reference to the proportion of legislators to be elected by functional constituencies and by territorial constituencies with various indirect and direct election components. *See* Yeung, *Political System Gains Form*, South China Morning Post, Nov. 17, 1986, at 2, col. 2.

9. *See* Leung, *Political Conflict 'Must End'*, South China Morning Post, Nov. 16, 1986, at 2; Leung, *Basic Law team 'Kept in the Dark'*, South China Morning Post, Feb. 5, 1987, at 1. At this writing, with the Basic Law nearly final, the relevant electoral provisions are still worded in the alternative and may remain so when a final draft is presented to the community for pubic comment.

10. Joint Declaration, Annex I, Article VI.

11. Joint Declaration, para. 3(2).

12. Here, reference is had to fundamental notions of civil liberty and natural rights as

almost Lockean, conception of natural rights. It is the mission of government to uphold these rights upon which the system depends. When government fails to fulfill this mission, there is a tendency to seek resort to legal process, or, in particular, the courts.[13] While it is difficult to gauge the importance of passive-government and a rights process to Hong Kong's success, it appears that Hong Kong does take rights seriously and that this may have something to do with historic confidence in its economic and political institutions.

While PRC participants express an equal commitment to Hong Kong's stability and continued success, they may come to the table with a different conception of rights and the rule of law. These differences are in some respects fundamental and diverge radically from rights and law conceptions under the style of liberal capitalism the Joint Declaration appears to envision. This is not intended to criticize China's remarkable achievements in developing laws, but instead to point out a fundamental divergence in values concerning rights and the rule of law between mainland China and Hong Kong. While China has in recent years had remarkable achievement in the drafting of new laws, this achievement has yet to be matched with an equal commitment to legal process. In the constitutional area, this has meant that many constitutional values have yet to enjoy consistent application.

This approach to constitutionalism in general, and rights in particular, has been traced to a policy conception of rights as gifts from the state rather than as a limitation on the state.[14] This is further evident in the

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well as private ownership under a capitalist economy. Under English administration Hong Kong has been a beneficiary of English common law and political concepts. The value system this entails has numerous Western intellectual sources but perhaps is best traceable to Western enlightened thinkers such as John Locke who might view government as keeping a trust and interpreting the values naturally held by the people. For discussion of Locke's theories (as well as enlightened thought generally) and reference to other sources, *see* D. GERMINO, MACHIAVELLI TO MARX, MODERN WESTERN POLITICAL THOUGHT, 116 *et. seq.* (1972). While it is difficult to measure precisely the influence of Western political, legal and economic thought on Hong Kong's current political and economic institutions, the current public discourse seems to suggest a strong influence. Furthermore, the existence of such common basic values in Hong Kong, as might be expected, has not produced a monolithic Hong Kong position on the numerous issues in the Basic Law process. As might be expected in a liberal pluralist society, sharp divisions have emerged among the Hong Kong participants. *See generally*, Yeung, *Debate on Conflicting Political Systems*, South China Morning Post, Nov. 5, 1986, at 1; Leung, *New Formula to Elect Chief Executive*, South China Morning Post, Nov. 5, 1986, at 2, col. 2. One should further note that the government in Hong Kong does not always achieve adherence to such values although it may have such aspirations. For example, numerous complaints concerning police practices would tend to bear this out.

13. For indications of the vigor of resorting to courts for review of administrative process in Hong Kong, *see generally* D. J. Clarke, B. Lai and A. Luk, Hong Kong Administrative Law: Cases and Materials (1986) (unpublished manuscript) (available at University of Hong Kong, Department of Political Science).

14. R. R. EDWARDS, L. HENKIN, A. J. NATHAN, HUMAN RIGHTS IN CONTEMPORARY CHINA, 44, 125 *et. seq.* (1986).

association of constitutional duties with rights.[15] In the area of free speech, for example, as evident in the recent campaign against "bourgeois liberalism," this could mean a predominant emphasis on the duty not to "infringe upon the interest of the state."[16] This contrasts with the liberal conception of free speech as a limit on government aimed at enriching the public debate. Owen Fiss has traced this different conception of free speech to even deeper value differences:

> The truth is, however, a little deeper and a little darker. It is not that China sees one elite (eg. bourgeois capitalist) as more of a threat to free speech than another, but rather that it is informed by a different set of commitments altogether. Private elites are curbed as a by-product of socialism, rather than from a commitment to free and open debate. True, China sees itself as a democracy, but it appears to have a top-down, as opposed to a bottom-up conception. The emphasis is upon leading the masses, not enriching debate. The true path has been found.[17]

Whether one accepts this account or not, it is evident that basic value differences between China and Hong Kong are dramatic. Even if one assumes a serious effort at liberal thinking in Beijing, one could reasonably be concerned about the fragile fabric of confidence in Hong Kong with a Basic Law rights foundation dependent primarily on mainland interpretation. Acknowledging this difference is merely to take seriously the notion of "one country, two systems."

C. *The Current Debate on Basic Law Implementation*

The various specific proposals for interpreting and applying the Basic Law seem to be products of both the shared objectives and the divergent values. In a report presented to the full Basic Law Drafting Committee in December of 1986, the Drafting Committee subgroup on local/central Government relations proposed that the power to interpret the Basic Law be assigned to the Standing Committee of the NPC.[18] News accounts of

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15. CHINA CONST. ch. 2, concerning the fundamental rights and duties of citizens. It is noteworthy that the Basic Law drafters have already entitled one of the proposed chapters of the future Basic Law "The Fundamental Rights and Duties of the Hong Kong Inhabitants".

16. *Id.*, Art. 51

17. 0. M. Fiss, *Two Constitutions*, 11 YALE J. INT'L L. 492, 501 (1986).

18. *"Preliminary Provisions on the Relationship Between the Central Government and the Hong Kong SAR and the Fundamental Rights and Duties of Hong Kong Citizens"*; Ming Bao Daily, Nov. 30, 1986. This proposal has essentially been adopted as proposed in the nearly completed first draft of the Basic Law submitted in December of 1987 to the Sixth Plenary Session of the Basic Law Drafting Committee by the subgroup on local/central Government relations, as follows:

Chapter 9. Interpretation and Amendment of the Basic Law of the HKSAR.

Article 169: The power of interpretation of the Basic Law shall be vested in the NCP Standing Committee.

If the NPC Standing Committee has given an interpretaion of a provision of this Law, the courts of the HKSAR shall in applying such provision follow the interpretation of the

this proposal suggest that this review, or "veto" power, would be exercised at the time Hong Kong legislation is reported to the Standing Committee of the NPC "for the record."[19] This proposal appears to have a strong Beijing imprint on it.[20] The mainland co-convenor of the subgroup, Mr. Shao Tienren, reportedly stated: "The NPC's Standing Committee will be vested with the final power to review future laws of Hong Kong, but in practice, the NPC will be unlikely to exercise the power frequently."[21] One suspects that actual exercise of such power would be unnecessary when indications of disapproval might dissuade the future legislature from passing "unconstitutional laws." It is noteworthy that another subgroup of the drafting committee concerned with political structure has recommended a political system based on separation of powers with "checks and balances."[22] It is difficult to square such propo-

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NPC Standing Committee. However, judgments previously given shall not be affected.

The courts in the HKSAR may, in adjudicating cases before them, interpret provisions of the Basic Law. If a case involves the interpretation of the Basic Law concerning defense, foreign affairs, and other affairs which are the responsibilities of the Central Government, the courts of the HKSAR shall ask the NPC Standing Committee to give an interpretation of the relevant provision before giving their final judgment on the case.

The NPC Standing Committee shall consult the HKSAR Basic Law Committee before giving an interpretation of this law. *See, Collection of Documents of the Sixth Plenary Session of the Drafting Committee*, Dec. 87.

19. *See Id.* Article 16: The HKSAR shall be vested with legislative power.

Laws enacted by the HKSAR legislative shall be reported to the NPC Standing Committee for the record, and such reporting shall not affect the coming into operation of the laws.

If the NPC Standing Committee, after consulting the HKSAR Basic Committee, considers that any law of the HKSAR is not in accordance with the law or legal procedures, it may return the relevant law for reconsideration or revoke it, but it shall not amend it. Any law which is returned for reconsideration or revoked by the NPC Standing Committee shall immediately cease to have force, but this cessation shall not have retrospective effect.

20. It should he noted that the PRC does not employ constitutional judicial review, instead it employs legislative implementation of its national constitution, i.e. constitutional rights and principles take on life when enacted into legislation by the NPC or its Standing Committee. CHINA CONST.; *See generally supra* note 14. Chen, *The question on the interpretation of the Hong Kong Basic Law*, Wide Angle Magazine, Mar. 16, 1985, at 24-27.

21. Yeung, *supra* note 19. In more recent statements, Mr. Shao Tien-ren has reiterated this position. *Before Review of the Hong Kong Laws, the Standing Committee of the NPC will Consult with Hong Kong People*, Ming Bao, Feb. 17, 1987, at 2. In the same comments Mr. Shao notes that Hong Kong courts currently have the power to interpret Hong Kong's constitutional documents subject to power in London to overrule them. Whether this is a veiled suggestion that Beijing may be willing to accept nominal assignment of the power of constitutional review in the Standing Committee with practical exercise of such power in the Hong Kong courts is not clear. The issue could well be ambiguously resolved in the current debate leaving it to the future judiciary and Standing Committee to work the issue out through some process of mutual tolerance.

22. Separation of powers with checks and balances usually suggest some form of constitutional judicial review as a means for the courts to perform their role of checking the other two branches of government. This can be distinguished from a French style functional separation of powers. *See* M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 35 (1971); J. Cummins, *Constitutional Protection of Civil Liberties in France*, 33 AM. J. COMP. L. 721, 722-24 (1985); Davis, *The Law/Politics Distinction, the French Conseil Constitu-*

sal with a constitutionally impotent court.

The proposal of the subgroup on local/central Government relations appears not to have been thoroughly considered, and has met with strong disapproval from leading Hong Kong drafters.[23] The subgroup had also included a recommendation that Hong Kong courts could "interpret" the provisions of the Basic Law "within the scope of the autonomy power."[24] The leading Hong Kong drafters objected to such limitation because it does not appear clearly whether the word "interpretation", as employed by both sides, is intended to include the power to hold legislation unconstitutional, i.e., constitutional judicial review. The subgroup's discussions suggests restriction of the latter power to the Standing Committee. As developed in the following sections of this essay, the subgroup's recommendations appear theoretically and structurally problematic.

In noting their objection, the leading Hong Kong drafters have suggested that the Hong Kong courts should have full power to "interpret" the entire Basic Law. They suggested that this was consistent with common law practices and would insure greater public confidence in the Basic Law. The subgroup was advised to consider the matter further and make further recommendations in 1987.[25] More recently, Martin Lee, perhaps the most outspoken advocate for the people of Hong Kong, and a leading figure among the Hong Kong drafters who have objected to the above sub-group proposal, has advanced a proposal of his own. Mr. Lee would have Hong Kong's highest court of appeal, upon any request from the Standing Committee, determine in an advisory capacity whether SAR legislation was unconstitutional.[26] Mr. Lee feels that if the Standing Com-

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tionnel and the U.S. Supreme Court, 34 AM. J. COMP. L. 45, 46-50 (1986); Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N. Y. U. L. REV. 363 (1982). The political structure subgroup appears to have recognized this tension between its proposals and those of the other subgroup in its meetings in February of 1987, when it endeavored to address the duties of the future judiciary. Leung, *Basic Law Compromise Sought*, South China Morning Post, Feb. 17, 1987. These meetings have pushed to the forefront certain tensions between those advocating the power of constitutional review in the Hong Kong courts and those advocating Standing Committee review. Compromise positions that are more politically than theoretically or practically informed have been advanced. It appears possible that this issue could remain with us under an ambiguous provision even in the implementation stage. The question of direct elections has tended to overshadow this and other important issues resulting in very little study of the interpretation issue. The final solution to this question should be worked out in the final draft of the Basic Law but could well be fashioned by the future judiciary with Standing Committee acquiescence. The current essay points out some theoretical and structural aspects of the issue for consideration over the long term dialogue in this area.

23. *See generally supra* note 18.

24. *Id.*

25. M. Lee, The Significance of a Written Constitution for Hong Kong, paper presented at A Conference on the American Constitution and the Hong Kong Basic Law: Some Comparative Observations, Sponsored by United States Information Service and the Department of Law, Hong Kong University on Jan. 16, 1987 (Anticipated publication of proceedings after revisions and editing by Hong Kong University Press, R. Stevens, ed.).

26. Perhaps an important weakness of this proposal is its complexity and its tendency

mittee was not satisfied with such a determination, it could then refer the matter for resolution to a special committee under the Standing Committee consisting of legal experts largely from Hong Kong. As with other drafters, Mr. Lee appears to separate constitutional judicial review from interpretation of the Basic Law - the latter for which local courts would have full capacity. The basis for this latter distinction is difficult to appreciate. Query whether the proposed advisory opinion with committee referral offends the Joint Declaration requirement of finality in local courts. These various proposals for implementing the Basic Law raise more questions then they answer but make a valuable contribution to this debate. While it appears that these proposals fail to fully appreciate the theory of judicial review in a constitutional democracy and create unnecessary structural tangles, they do represent a beginning dialogue with reference to the important question of implementation of the Basic Law.[27]

Although attempts are being made at preliminary resolution of this issue, it appears that until this important issue is more thoroughly considered, any such resolution will be subject to question until the final drafting stage. If the American experience is any guide, the judiciary will add its own imprint after 1997. In the final analysis, any proposals, and the final product, should be judged both theoretically and structurally in terms of the imperatives of the Joint Declaration and the objectives of the participants. After examining theoretical and structural perspectives on constitutional judicial review, an alternative model for discussion will be offered. It is hoped that this alternative model will serve to highlight the theoretical and structural features that should be carefully examined with reference to any final product of this important Basic Law drafting process.

II. A THEORETICAL PERSPECTIVE ON CONSTITUTIONAL JUDICIAL REVIEW

Beginning with a commitment to republican government and a concept of fundamental rights, Western constitutional theorists have engaged in a centuries old debate on the legitimacy of constitutional judicial review. Constitutional judicial review engages the courts in the process of deciding whether laws produced through majoritarian processes conform to the more fundamental principles of law enunciated in the constitution or basic law. This includes interpreting the basic law to ascertain its imperatives. Under a system of constitutional judicial review, depending on the type of constitutional review system employed, the court may refuse to give effect to, or invalidate, the statutory law in question. For now this discussion will focus on the American style of judicial review common in many (but not all) common law countries. Discussion of alterative sys-

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to entangle the courts of Hong Kong in the national political process. The character of this entanglement may be very difficult for the people of Hong Kong to appreciate and may further erode their confidence. *See also*, Davis, *Matters Not Being Considered With Respect to the Power of Interpretation Under the Basic Law*, Ming Bao, Jan. 19-22, 1987.

27. *See generally supra* note 18.

tems for judicial review will follow in the next section. This section will instead introduce certain legitimacy issues raised by constitutional theorists concerning judicial review. By understanding these issues one might better focus on the merits of constitutional judicial review, as well as its possible relationship to the autonomous functioning of a liberal capitalist constitutional democracy. This may better inform our judgment with respect to interpreting and applying the Basic Law of Hong Kong.

The United States currently has the world's oldest continuously operating system of constitutional judicial review. This system traces its roots to British common law legal traditions and the colonial experience.[28] The American system of constitutional review can be more directly traced to the famous opinion of Chief Justice John Marshall in *Marbury v. Madison*.[29] In that opinion, which overturned certain features of the Judiciary Act of 1789,[30] Chief Justice Marshall seized for the court the power to declare acts of Congress to be in violation of the American Constitution. Even though constitutional judicial review was not mentioned in the American Constitution, Chief Justice Marshall, using a syllogistic style of analysis, found such a power to be inherent in the American system of separation of powers with checks and balances. He argued that if the Constitution was the supreme law of the land and the court was charged with upholding it, then it followed that any law passed by current majorities in Congress would be unconstitutional and of no effect if it failed to comply with the requirements of the Constitution. The court was charged with upholding the will of the people expressed in the Constitution. In Alexander Hamilton's words, in Federalist Papers No. 78: "Where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."[31]

The Marshall syllogism sounds convincing enough on its face, but it fails to address two important problems. First, it fails to adequately address how one might confidently discern the will of the people expressed in the constitution, or, more explicitly the problem of construction of the constitution. Secondly, it failed to adequately address the problem of the legitimacy of non-elected justices thwarting the will of the democratically elected branches of government, i.e., it failed to adequately address the counter-majoritarian difficulty inherent in this process. Debate has now raged over these issues for two centuries. This debate, with the spread of judicial review, has now been flung to the far reaches of the world.[32] This

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28. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD, 36-41 (1971).

29. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 80 (1803).

30. The court declared the section of the Judiciary Act of 1789 delegating the mandamus power to the United States Supreme Court in original jurisdiction to be unconstitutional, seizing the important power of judicial review for itself while giving a victory to the president in that particular case.

31. *See generally*, A. M. BICKEL, THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS, 16 *et. seq.* (2d ed.1986).

32. *See e.g.*, Cappelletti, *supra* note 22; Zamudio, *A Global Survey of Governmental*

debate has revealed, in various permutations, the interconnectedness of these issues. More importantly, it has revealed a great deal about the constitutional law-making process that should not be ignored by a polity about to embark on this process. A brief look at recent discussions of these issues will serve to illuminate the useful function of constitutional judicial review in a capitalist liberal democracy.

The historical debate has focused on whether a judge, in exercising judicial review, should be bound by the "original intent" of the constitutional framers, or whether this constitutional mission requires reference beyond the constitutional document to other higher values or principles or perhaps just policy.[33] If one elects the latter avenue, as does a majority of current theorists, the question becomes where to look, and what constrains judicial decision. This all bears obvious relationship to what has been described as the counter-majoritarian difficulty,[34] a concern that increases to the extent that judges are given free rein. For reference, and inconformity with general conceptual practice, the original intent theory will be styled "interpretivism", while the theories calling for reference beyond the constitution and its legislative history will be called "non-interpretivism."[35] It should be noted that some schools of thought have attempted to undermine the enterprise of constitutional theory,[36] e.g.,

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Institutions to Protect Civil and Political Rights, 13 DEN. J. INT'L L. & POL'Y 17 (1983); Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461 (1980); Spiliotopoulos, *Judicial Review of Legislative Acts in Greece*, 56 TEMP. L. Q. 463 (1983); Ratner, *Constitutions, Majoritarianism, and Judicial Review: The Function of a Bill of Rights in Israel and the United States*, 26 AM. J. COMP. L. 373 (1978); Gyandoh, *Interaction of the Judicial and Legislative Processes in Ghana Since Independence*, 56 TEMP. L. Q. 351 (1983); Bolz, *Judicial Review in Japan: The Strategy of Restraint*, 4 HASTINGS INT'L & COMP. L. REV. 88 (1980); Keith, *A Bill of Rights for New Zealand? Judicial Review Versus Democracy*, 11 NEW ZEALAND U. L. REV. 307 (1985).

33. For articulation and further reference concerning original intent or the interpretivist position *see e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). For the more expansive views, *see e.g.*, BICKEL *supra* note 31; J. H. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (1980); J. H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS, A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); M. J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICY MAKING BY THE JUDICIARY (1982); Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 MINN. L. REV. 587 (1985); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV., 193 (1952).

34. *See* BICKEL *supra* note 31. This difficulty refers to the undemocratic character of non-elected judges in effect invalidating the acts of the elected branches of government and resultant legitimacy problems. *See also*, Ely, *supra* note 33, at 105 *et. seq.*

35. *See*, Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U. L. REV. 1435 (1984); Grey, *Do we have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

36. *See, e.g.* Van Alstyne, *Interpreting this Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209(1983) (from the right); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L. J. 1037 (1980) (from the left).

critical theorists, while others have tended to dissolve this conflict by shifting the focus to the nature of interpretation, often drawing parallels from literature or scripture.[37] Space does not permit giving all these theories the attention they deserve.

The mission will instead be a more selective one of trying to draw some lessons from the constitutional law-making process that may be of some use in our current, very unique comparative context. This examination reveals a certain elaborative process of dialogue that is fundamental to constitutional human rights development in a system with a written constitution. In most cultural and societal contexts, where rights are taken seriously, judicial review is becoming an important component of this process. Only through understanding this process, particularly in the common law context, can Hong Kong make a rational decision concerning this component.

The interpretivist position, articulated perhaps with greatest elaboration by Raoul Berger, admonishes the judiciary to be mindful of its limited role, delineated in Marshall's syllogism, of applying the written constitution.[38] This interpretation process can appropriately be informed by legislative history, but not otherwise by reference to sources external to the constitution and its original intent. The founding fathers, it is urged, did not intend government by judiciary. Much of modern constitutional law would tend to violate this viewpoint, as it engages in a much more elaborate shaping of fundamental values and even policy.[39] Interpretivists suffer wide ranging criticism. They also suffer their own countermajoritarian difficulty; one of having founding fathers ruling subsequent generations from the grave. Marshall himself admonished us that a constitution was not intended to "partake of the prolixity of a code", that it was a living document.[40] Some would say that the constitution is an outline of principles to which the polity is committed.[41] Elaboration of these principles is a continuous contextual process. Other critiques of interpretivism proceed from a different notion of law in general, and constitu-

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37. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984) (discussing attempts at this approach which he labels "rejectionist"); Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985).

38. Berger, *supra* note 33, at 115 *et. seq.*

39. Most civil law jurisdictions have openly acknowledged the essential political nature of constitutional judicial review in their creation of separate constitutional courts. These courts have in some cases made dramatic constitutional decisions. *See generally*, Mezey, *Civil Law and Common Law Traditions: Judicial Review and Legislative Supremacy in West Germany and Canada*, 32 INT'L & COMP. L. Q. 689 (1983) (discussing abortion cases); Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980). These cases are matched in America by decisions such as the leading American abortion decision. Roe. V. Wade, 410 U.S. 113 (1972).

40. McCulloch v. Maryland, 4 Wheaton 316, 4 L. Ed. 579 (1819).

41. *See* Curtis, *A Modern Supreme Court in a Modern World*, 4 VAND. L. REV. 427, 428 (1951); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. R. 1 (1959).

tional law in particular. This notion is process-focused and sees the constitutive process as part of a complex dialogue within and between the political branches, the people, and the courts.[42] Other critics would simply admonish interpretivists that a century of constitutional elaboration has proven them wrong.[43]

Non-interpretivists, on the other hand, represents several complex positions. Much current debate ranges between these various positions. Perhaps not enough has been done to achieve a synthesis of their insights. Such a synthesis may be the only reasonable way for a comparativist to make use of this elaboration. Because they cannot claim legitimacy solely from the articulations of the founding event, the non-interpretivists have been more troubled with the counter-majoritarium feature of constitutional judicial review and have sought various means of dissolving this problem. In spite of its difficulties, non-interpretivism has managed greater conformity with constitutional reality and has more clearly taken the much more satisfying step of recognizing that a constitution is something more than an ordinary statute. It has also pushed American constitutionalism beyond the rather acute interpretivist style counter-majoritarian difficulty; the problem of a handful of eighteenth century colonist ruling the present from their grave.[44]

In a broad sense, non-interpretivism, especially as elaborated in what might be considered its best articulation by Alexander Bickel, would have the court look beyond the written constitutional document to certain basic values or principles about which that document only provides an outline.[45] It is in the nature of a living constitution that these principles are not fixed, but evolving. Growth and elaboration of such a principle is a task to which the judiciary is peculiarly suited by virtue of temperament and process. Bickel elaborates two levels of law-making: laws that address immediate or expedient needs, and laws that elaborate our collective deeply felt values and are developed incrementally.[46] These latter laws

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42. BICKEL, *supra* note 31, at 117 *et. seq.*

43. *See* Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, Conkle, *supra* note 33, at 659 (citing congressional acquiesence).

44. Some seek to avoid this problem by citing the ability of constitutional amendment, but in a society such as the United States where this has rarely occurred, the most significant instance requiring a civil war, this position is subject to attack. *See generally* Berger, *supra* note 33.

45. *See* BICKEL *supra* note 31, at 23. Bickel notes in defense of the courts role:

The search must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be accepted in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and the burden of their responsibility.

46. Here he refers to what he describes as a "Lincolnian tension". He is speaking of

are best developed with the aid of the reflective, contextually focused judicial process and not in the give and take of policy focused legislative expediency.

Bickel does not stop there but goes on to elaborate a judicial process for value development. This process does not envision a judiciary in isolation, but a judiciary engaged in a complex dialogue with the elected branches and the polity at large.[47] In this process the court has three options: first, it can overturn the legislation in question; second, it can uphold and legitimate it; or third, it can do neither.[48] In choosing the third option, the court employs certain techniques or doctrines of avoidance that contribute to the dialogue with the other branches of government, and permits the court to inform itself and wait for the appropriate time for further elaboration of principle. These avoidance doctrines, or "passive virtues", are instruments of dialogue for law-making on the higher plane of principle. These instruments include such doctrines as standing, mootness, ripeness and the delegation doctrine, and tools such as legislative interpretation and vagueness, to name just a few. What Bickel presents is a very complex notion of process, or dialogue, that may be fundamental to the Anglo-American concept of rights, with or without constitutional judicial review. With the spread of judicial review, this notion may be gaining favor elsewhere.

Dean Harry Wellington has provided further elaboration of Bickel's dialogue-based development of principled law or rights by focusing on the question of finality in constitutional opinions.[49] Bickel might suggest that a constitutional opinion is not really final until the people say it is. While courts will frequently employ passive virtues to avoid the premature elaboration of principles, as they have done in death penalty cases, they may ultimately elaborate a principle, and then, if appropriate, seek to back out somewhat. Wellington sees this as having occurred in American abortion cases after the court initially issued a rather liberal opinion in *Roe v. Wade*.[50] It had worked up to this point with passive virtues in several

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Lincoln's commitment to the principle of equality tempered by willingness to compromise to expediency when political process so demands. In such a process principle can be compromised but not surrendered. This commitment to principle may be counter-majoritarian and so some willingness to compromise is also a concession to democracy. *See Id.* at 65, "Our Democratic system of government exists in this Lincolnian tension between principle and expediency, and within it judicial review must play its role". *Id.* at 68. An important point for Bickel is that the court is not engaged in an unrelenting search for principle but takes account of the competing needs of expediency in its principle development. *Id.* at 200. This permits judicial participation in a wider dialogue.

47. *Id.* at 117 *et. seq.*

48. He stresses the importance of the courts educational function. "But in withholding constitutional judgment the Court does not necessarily forsake an educational function, nor does it abandon principle. It seeks merely to elicit the correct answers to certain prudential questions that, in such society as Lincoln conceived, lie in the path of ultimate issues of principle". *Id.* at 70.

49. Wellington, *The Nature of Judicial Review*, 91 YALE L. J. 486 (1982).

50. *Id.* at 517-519. Dean Guido Calabresi has developed an excellent analysis of the

contraception cases. After *Roe v. Wade*, the court then backed up a little, permitting certain limitations on funding, etc., for abortions.

The Bickel/Wellington reasoning acknowledges the counter-majoritarian difficulty, but, under Bickel, is less concerned with it, given the Court's incremental elaboration of principles in a process informed by dialogue with the people and the democratic branches of government. Wellington elaborates further, noting there are many counter-majoritarian features in any constitutional democracy, and that any system of law based entirely on, and immediately responsive to, majoritarian expediency would be unstable.[51] He notes that fascism under Hitler was initially such a system. Bureaucracy is a common, frequently counter-majoritarian instrument, as are legislative seniority systems, etc. Delay and reformulation of majoritarian preferences may be necessary to prudent government action and stability. This notion of stability is a particular concern in Hong Kong. By providing structure for development and elaboration of higher norms, constitutional judicial review is a valued stabilizing force. Structuring democracy in order to stabilize it seems eminently preferable to destroying democracy in an alleged search for stability; the latter being the direction Basic Law discussions in Hong Kong often take.

As noted above, Wellington would focus more attention on finality than on the counter-majoritarian problem. With the aid of Bickel's passive virtues and principled decision, this latter problem is also largely overcome. This concern with finality stems from the fact that a constitutional decision, unlike a common law decision, cannot be overturned by the legislative branch. But in the case of a properly informed process of principled decision, the court will itself back up when necessary. He feels less secure about policy based decisions as less susceptible to being proven wrong.[52]

A constellation of other theories are located around this non-interpretivist core. Herbert Wechsler, before Bickel, noted a role for courts in developing "neutral principles."[53] Wechsler's neutral principles are very limited reasoned principles that are to be elaborated very conservatively, generally giving way to legislative choice. Wechsler, in Bickel's view, did not appreciate the broader role of the Court with reference to the dialogue concerning policy expediency and principle.[54] Wechsler would not

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dialogue process between courts and the legislative branch in his book focused on updating statutes. *See*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

51. Wellington, *supra* note 49, at 488-492. "The instability fostered by a government that instantly gratified majorities would slow or halt the growth of reasonable expectations." *Id.* at 492. "[A] governmental structure that fails to unite a nation's present with its past necessarily fails to preserve values to which its citizens may attach considerable weight." *Id.* at 494. "To the contrary, wherever our system creates a danger of majority willfulness, some tempering devise is interposed." *Id.* at 498.

52. *Id.* at 504 *et. seq.*

53. Wechsler, *supra* note 41.

54. BICKEL, *supra* note 31, at 68-69.

be with the Court on much modern civil rights law.

John Ely, on the other hand, takes issue with Bickel's views concerning the court's superior ability to articulate fundamental values.[55] Absent such superiority, Bickel's views are thought to encounter considerable counter-majoritarian difficulty and legitimacy problems. Borrowing from a footnote in the *Carolene Products*[56] case, Ely sees the mission of judicial review as participation reinforcement and the related function of protection of minority rights.[57] While acknowledging participation reinforcement is also a value, he feels this is the primary value of participatory democracy.[58] Ely sees participation reinforcement as not only what the court should do, but as what it in fact does. Ely urges that he has gotten around the counter-majoritarian difficulty by confining the judiciary to, in effect, unclogging the majoritarian process.[59] This is the one mission elected officials are not good at because their self interest gets in the way.

Other theories, such as Michael Perry's recent effort, would give greater leeway to judicial policy making, letting judges internally reach the right result based on policy concerns.[60] In addition to counter-majoritarian difficulty, this runs into problems with the lack of external constraint. Finally, some recent efforts have focused on the process of interpretation itself, carrying the debate to the rather lofty reaches of scripture interpretation.[61] These scholars examine the contextual element in any effort at understanding a constitutional text, and thereby seek to dissolve the interpretivism/non-interpretivism dichotomy, bringing in through another door - contextualism - many features that would meet with traditional interpretivist disapproval.

At a minimum, these various schools of thought elaborate many concerns with legitimacy and accountability when a non-democratic institution is employed in a system fundamentally committed to democracy. These concerns are described by such terms as counter-majoritarianism finality, and constraint. Yet the use of constitutional judicial review as an instrument of constitutionalism would not be experiencing such a dra-

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55. Ely, *supra* note 33, at 63.

56. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). In a case that was otherwise insignificant, the court hinted a change in direction:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious. . . or national. . . or racial minorities. . .; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

57. Ely, *supra* note 33, at 73 *et. seq.*

58. *Id.* at 75.

59. *Id.* at 88, 102.

60. Perry, *supra* note 33.

61. *See generally supra* note 37.

matic increase if the value achieved was not generally considered sufficient to override these concerns. Outside of certain limited cultural and legal contexts, in modern pluralistic democracies, constitutional judicial review, while not by itself sufficient,[62] may well be practically necessary to a meaningful commitment to rights. I believe its usefulness relates to the principle elaborating dialogue it brings to the process of constitutional rights development.

This dialogue, or communication-based concept of constitutional theory, is less iron-fisted than public debate would have us believe of written constitutions. If anything reflects a failure of constitutional theory, it is the purest strain theories often advance. There is a tendency to demand too much of a theory. Contradiction is not tolerated. Law, outside of the most constricted strains of legal positivism, lacks such iron-fisted will. It appears instead to be a communications process, or a dialogue between relevant actors, that takes shape in legal principles. In constitutional law, if this dialogue produces values, these are the values of an ongoing discussion. This dialogue in the United States, informed by a written constitution, extends the full scope of American history. Any theory of constitutional law should seek to understand the tensions and images this process produces. This is especially true for a comparativist who seeks to benefit from this experience.

Many current constitutional theories give us a picture of part of the dynamic; like photos from different angles. Bickel's passive virtues are fundamental ingredients. Neutral principles are also relevant, though Wechsler may have confined them too narrowly. Representation reinforcement or participation models likewise capture, perhaps, the most fundamental constitutional value under a democratic constitution, but fail to explain all the results. Perry's policy analysis likewise presents an ever present feature of modern constitutional cases, but this has severe legitimacy problems. Yet many, but not all, modern theories place some value on the process of developing fundamental values, perhaps best explained as a dialogue within a democratic political system; a dialogue to a large extent directed by the judiciary incrementally with the instrument of constitutional judicial review. Bickel especially contributed to this foundational understanding.

Constitutional judicial review, as an ingredient in this dialogue, has certain characteristics that may lend order to the process of principle development within a constitutional democracy. I believe this feature is in part honoring the commitment of liberal democracy to passive government, a commitment that other branches of government can often ill afford in modern society. In a system of government strongly influenced by

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62. The widespread use and abuse of emergency powers to cut off judicial review illustrates both the strength and weakness of this instrument, e.g. earlier in the Philippines, India, and Taiwan. This likewise reveals dependence on the polity and political branches. Yet, where properly employed, its popularity suggests its value as a stabilizing force of importance to a polity committed to constitutional implementation.

Lockean liberalism and republicanism, the judiciary, more than any other branch, honors liberal government's commitment to uphold certain principles and rights which said government is charged to honor. The commitment to the rule of law, rights, democracy and capitalism, evident in the Sino-British Joint Declaration, seems to envision such a local government for the Hong Kong SAR.

In honoring its commitment, the judiciary engages in a process of developing principles through a discourse with the democratically elected branches of government. John Ely tells us this discourse includes a particularly strong commitment to democratic participatory process. Yet there are other commitments to principles. But these principles, largely described in the broad outline of constitutions or basic laws, often lack contextual coherency. It is with an eye to principled roots and through a dialogue with the political process that the court performs its unique role of ferreting out these values. This ferreting out, as many scripturalists suggest, is contextual, but at the same time textual. The text is only the foundation, but strongly anchors the dialogue process. In this process, Bickel's passive virtues are valuable tools for communication. In this inherently conservative enterprise, these instruments permit the reflection necessary. The counter-majoritarian difficulty may sometimes be less a difficulty and more a virtue as the public dialogue is anchored to our basic values, those values that perhaps the majority, on reflection, cares most about. Such a stabilizing force may not be at all unattractive to Hong Kong.

It seems apparent that, whatever theory or theories are employed, constitutional judicial review has come to play an increasing role in the constitutional conversation in a growing number of national and international legal systems. The growth of this instrument seems to reflect a growing belief in its ability to improve that conversation. If this is so, then the empirical evidence may well suggest that this instrument gives substance to the notion of rights in constitutional democracies. Meta level analysis aside, one may assert that with limited exception,[63] constitutional judicial review may well be essential in the present intellectual context to meaningful and stable rights development. Again, with limited ex-

63. The United Kingdom has succeeded in implementing a system of rights without a written constitution or constitutional judicial review of legislation. Hong Kong has historically benefited from this tradition. It is difficult to determine whether the culturally bound traditions of the United Kingdom can continue to flourish in foreign cultures without British participation. Most former British colonies employ constitutional judicial review. One which does not, New Zealand, appears to be moving in that direction through the drafting of a bill of rights. *See supra* note 32. Britain may itself be moving in that direction, with its participation in the European Community. The problem becomes even more acute when one considers a former British overseas territory which will no longer be under British influence, but will instead be under another national government that has a very different approach to rights. This other approach may not be conducive to continued confidence in Hong Kong's stability, at least in the short run. The Joint Declaration appears to acknowledge this difficulty.

ception, the absence of constitutional judicial review has often revealed the opposite pattern.[64]

For Hong Kong, this might suggest that constitutional judicial review offers a stabilizing, less politicized tool to effectuate the principles of the Joint Declaration and yet afford Hong Kong a stable environment for democracy. Such democracy may indeed depend on it. The competing claims of the Hong Kong SAR political arrangement can best be addressed through proper structuring of this instrument. By transferring a significant portion of the basic value, or rights development process, to a more neutral, less politicized forum, I believe constitutional judicial review may serve to reduce the occasion for disagreement over fundamental values by the Marxist and capitalist participants in this unique political endeavor.

III. A STRUCTURAL PERSPECTIVE ON CONSTITUTIONAL JUDICIAL REVIEW

If one accepts the view that constitutional judicial review has come to serve as a stabilizing force and as a central force for the evolution of basic values or higher law in a liberal capitalist democracy, then it becomes apparent that this instrument is not really the mechanical devise that the Marshall syllogism may suggest. Constitutional judicial review may be said to play a critical role in a dialogue that is central to the evolution of values in a democratic system, a dialogue which seeks to illicit with regard to what values the people can be heard to say, in Bruce Arkerman's words, "we really mean it."[65]

Yet we would be remiss in our search for understanding of the concept if we confined this search to the meta level or to certain Anglo-American roots. In the context of China and Hong Kong, we have the coming together of at least two legal systems -civil law and common law - with certain fundamental elements of a third - socialist law.[66] Added to this are unique Chinese historical roots. This section will briefly examine some of the leading structural elements of various systems of constitutional review extant in the world today. While any exhaustive examina-

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64. *See* Cappelletti, *The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 439 (1980): "As for the alleged 'shift away' from democracy, an elementary awareness of historical developments should suffice to convince us that, at least in modern systems of government, precisely the opposite is true. All totalitarian regimes of our century have shown themselves to be antagonistic towards judicial review of governmental, particularly legislative action."

65. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013, 1041 (1984).

66. On constitutional implementation of rights in socialist countries, *see generally, supra* note 14; Osakwe, *Soviet Human Rights Law under the USSR Constitution of 1977: Theories, Realities and Trends*, 56 TUL. L. REV. 249 (1981); Hazard, *The Common Core of Marxian Socialist Constitutions*, 19 SAN DIEGO L. REV. 297 (1982); Markovits, *Pursuing One's Rights under Socialism*, 38 STAN. L. REV. 689 (1986); Comment, *Cuba's 1976 Socialist Constitution and the Fidelista Interpretation of Cuban Constitutional History*, 55 TUL. L. REV. 1223 (1981); Eliasoph, *Free Speech in China*, 7 YALE J. WORLD PUB. ORD. 287 (1981).

tion of the unique qualities of the numerous systems available cannot be taken up here, a limited look at the more common structural features may aid our understanding. The next section will then close this essay with some preliminary assessment of the applicability of this concept of constitutional review to the Hong Kong SAR.

A glance over the various legal systems in the world presents a wide array of options employed for constitutional implementation. Prominent examples include, but are not limited to the following:

1. The French Constitutional Court.

This body is not considered a court at all, but instead, a political entity that issues abstract opinions regarding legislation before it is promulgated. It is particularly attentive to allocation of constitutional power within the system. The French constitutional court system is supplemented by administrative courts which review executive acts, as well as courts of general jurisdiction.[67]

2. The Austrian Constitutional Court.

This court decides the constitutionality of statutes only when the statute is in effect sued by the executive or the highest ordinary courts. It has exclusive competence over constitutional issues. This was the prototype of constitutional judicial review in continental Europe. A decision from this court is prospective and may abrogate the statute from the books.[68]

3. The German Constitutional Court.

This court combines elements of the Austrian and American system with the largest number of cases coming to it by way of referral from other courts. Other courts can hold statutes constitutional but not unconstitutional. The German constitutional court also receives abstract cases through certain references from other branches of government.[69]

4. The American System of Judicial Review.

Extends to all courts in the land, with binding decisions coming from the Supreme Court at the top. Courts are empowered to act only in concrete cases or controversies. There are limited exceptions permitting abstract advisory opinions from certain state courts on state constitutional and legislative issues.[70]

5. Legislative Interpretation.

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67. *See generally, supra* note 22; *see also* Cappelletti, *supra* note 64, at 412-21. Cappelletti notes that even France, a country historically most resistant to the concept of judicial review, has somewhat incrementally conceded to this instrument on several fronts, such as review of French executive legislation by the administrative courts, review of non-promulgated laws by the constitutional court, and review of laws under European Economic Community law by the ordinary courts.

68. *See* Capelletti, *supra* note 22, at 71-74.

69. *See id.* at 75-76; Kommers, *supra* note 39; Mezey, *supra* note 39.

70. *See supra* note 29; *see generally, supra* note 33.

Under this system, employed in the Peoples Republic of China, the constitution is interpreted and enforced through legislative acts by the National People's Congress or its Standing Committee. Courts are then to apply such legislation. Courts do not have the power of judicial review over legislation. This system often means that some rights provisions do not receive vigorous attention, depending on current policy concerns.[71]

6. "Implied" Judicial Control With Parliamentary Supremacy.

In a system such as the one employed in the United Kingdom, through tradition and practice, independent courts achieve a measure of judicial control over constitutional implementation through rules of interpretation, application of "unwritten principles" and careful control of administrative acts. This system, in some respects, may be said to rely heavily on Bickel's passive virtues in constitutional dialogue. Yet the courts do not possess the power of constitutional judicial review in this system of parliamentary supremacy. The introduction of European Community law may tend to undermine some aspects of this latter feature.[72]

7. Separate Administrative Courts.

In the French Conseil d'Etat a separate court system reviews administrative acts, delegating statutes (through interpretation) and regulations or executive legislation for conformity to the "general principles of law" reflected in the constitution and the Declaration of the Rights of Man. This includes party initiated review of all executive acts, decrees and ordinances but does not directly permit constitutional judicial review of parliamentary acts. While the Conseil d'Etat cannot directly overrule a statute, it may sometimes interpret away statutory provisions of questionable constitutionality.[73]

8. Constitutional Consultation or Advisory Opinions.

This approach is concurrently employed by some American state supreme courts and in certain countries such as Canada.[74]

While this list is not exhaustive and totally fails to reveal the complexity and functioning of these various systems (a task well beyond the time and space constraints of the current essay), it does reveal a diversity of models and further reveals in the several models employing constitutional judicial review that such a concept is by no means monolithic.

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71. CHINA CONST.; *See generally, supra* note 14; Chen, *supra* note 20. Recent political debate and policy in China has tended to pay greater attention to political and economic rights. *See e.g., Resolution of the Sixth Plenary Session of the 12th Central Committee of the Communist Party of China*, South China Morning Post, September 29, 1986, at 22-23. Some in China have recognized a relationship between political reform and economic success. As illustrated in the current campaign against "bourgeois liberalism", China has yet to develop a coherent and comprehensive process for implementation of constitutional rights, leaving China's rights record somewhat spotted.

72. *See* Cappelletti, *supra* note 22, at 36-41; H. STREET & R. BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW DE SMITH 75-119 (5th ed.1985).

73. *See supra* notes 22 and 67.

74. *See* Cappelletti, *supra* note 22, at 70. This approach supplements judicial review.

These differences in approach often flow from fundamental historical conceptual differences.

Mauro Cappelletti has noted that, based on historical roots, systems of constitutional judicial review can sometimes be divided into two main types. These include the American model and the Austrian model, the latter being developed under the influence of Hans Kelsen.[75] In order to make better sense out of these divergent approaches, Cappelletti employed a set of more general concepts. These concepts can be said to operate on at least two different planes as follows:

1. A system may be characterized as centralized or de-centralized.[76]

The decentralized system is typified by the American approach in which all courts of the land have the power of constitutional review. This system is employed in many common law countries including Canada, Australia and India. It also exists in civil law countries such as Japan and Greece and has existed in the Philippines.[77]

A centralized system is typified by Austria and involves a separate constitutional court, often but not always possessing exclusive jurisdiction to decide the constitutionality of legislation. Within the large number of civil law countries that employ this system there is considerable divergence in detail. These countries prominently include Austria, Italy, Germany, Cyprus, Turkey and Yugoslavia, the latter being the only communist nation I know of that possesses such a system.[78] Other communist countries have considered this approach.[79] Under such a system, constitutional issues are referred to the constitutional court. The German system is mixed in that ordinary courts can determine constitutionality but not unconstitutionality of legislation.[80] Cappelletti and others trace this development to separation of powers notions that focus on separation of functions.[81] Constitutional judicial review is considered a political function best assigned to a separate quasi-political court and not ordinary courts. These courts must decide the issue and cannot easily escape through employment of avoidance techniques or "passive virtues."[82] These constitutional courts will formally declare statutes invalid (with the exception of France), while courts in decentralized common law systems do not do so, relying instead on *stare decisis* effect.[83] A civil law system without *stare decisis*, and with more than one court system, would have difficulty employing a decentralized system because of conflicts.

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75. *Id.* at 45 *et. seq.*
76. *Id.* at 46-53.
77. *See* Spiliotopoulos, *supra* note 32; Bolz, *supra* note 32.
78. *See* Cappelletti, *supra* note 22 at 50-51.
79. *Id.*; *see also supra* note 66.
80. *See supra* note 69.
81. Cappelletti, *supra* note 64, at 413; Cappelletti, *supra* note 22, at 54.
82. Cappelletti, *supra* note 22, at 81.
83. *Id.* at 85.

Greece has done this by employing a separate court at the top to resolve the constitutional conflicts.[84] Finally, ordinary judges in civil law countries may not be suited by training and practice for value oriented quasi-political constitutional judicial review decisions.

2. A system may be characterized by review "incidenter" or review "principaliter."[85]

Review incidenter, characteristic of the American system, indicates that the court exercises constitutional judicial review when constitutionality issues are raised in ordinary cases by parties. Constitutional jurisdiction is merely incidental to the case. Incidenter review is having an increasing impact. It is routinely employed in common law systems with constitutional review, e.g., United States, Canada, India, Australia. It is likewise employed in Japan, Norway, Denmark, Sweden, and Greece.[86] As noted below, many continental systems with roots in review principaliter have also begun to concurrently employ incidenter review. Cappelletti notes that the mere fact that the legislative body in Canada, India and many American states can request advisory opinions does not defeat their characterization as systems primarily based on review incidenter, as this advisory feature is merely "constitutional consultation" and not constitutional judicial review at all.[87]

Review principaliter is characteristic of the original Austrian model of Hans Kelsen.[88] This system emphasizes presentation of constitutional issues in constitutional courts as the principal issue, via initiation by government authorities. This is done on an *ad hoc* basis and not incidental to a case or controversy. This tends to emphasize abstract resolution of constitutional issues. Even the Austrian prototype was modified in 1929 to permit initiation of action by the highest courts incidental to a case determination, thus incorporating incidenter features while retaining the principaliter foundation.[89] With this modification, such incidenter reference to the constitutional court is not discretionary. In Germany and Italy, the same principaliter and incidenter ingredients co-exist except all judges at all levels are required to make such an incidenter referral if a statute is constitutionally suspect. Likewise, all judges may hold a statute constitutional without referral.

Having developed this structure of analysis Professor Cappelletti, a noted Italian constitutional scholar, gave his impressions of the impact of the differences. He noted that the ordinary continental courts, because of their more limited constitutional role, experience less pressure for constitutional awareness. Constitutional courts tend to focus in the abstract

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84. Spiliotopoulos, *supra* note 32.
85. *See* Cappelletti, *supra* note 22, at 69 *et. seq.*
86. *Id.*; *see also* Spiliotopoulos, *supra* note 32.
87. Capelletti, *supra* note 22, at 70.
88. *Id.* at 71 *et. seq.*
89. *Id.* at 73.

and ignore concrete reality; their constitutional proceedings are less adversarial and more objective, focusing more on safe-guarding the law and less on the rights of individuals. Such constitutional courts have less access to techniques of avoidance or passive virtues, with even legislative interpretation being assigned to ordinary courts.[90] He notes, however, that American courts may too readily employ avoidance, but that generally, the American system has spawned a judiciary very sensitive to the political and potentially anti-democratic nature of constitutional review. Employing this assessment, if constitutional review is an instrument of constitutional dialogue and value development, it becomes difficult to justify a general application of the Austrian or continental model in a common law jurisdiction. Even in continental countries such as Germany and Greece, a certain convergence with the American approach is evident.

In addition to the above, certain other structural options should be noted. Note has already been taken of the rather unique (for civil law countries) Greek model, employing a decentralized incidenter system with a special court at the apex to resolve constitutional conflict between Greece's three court systems.[91] In a common law jurisdiction, Canada has recently added some distinctive features.[92] As noted above, it permits constitutional consultation on request from the political branches. The Canadian Charter of Rights and freedoms also provides in Section (1) for the guarantee of "the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Since Canada has judicial review, the meaning of this provision awaits judicial action. The most distinctive feature of the Canadian Charter is, however, its provision for express parliamentary override of some *but not all* of its bill of rights provisions.[93] This requires an express declaration in the legislation, and last for only five years, subject to renewal. It is noteworthy that even in the American constitutional debate of two centuries ago Edmond Randolf proposed that the President "and a convenient number of the National Judiciary, ought to compose a council of revision" to examine every act of congress and by its dissent constitute a veto.[94] This proposal was rejected.

It should be further noted that any decentralized incidenter system may want to employ a concept similar to the American doctrine of *certiorari* which permits the highest court to choose not to accept a case for review, with certain limited exceptions where appeal might be permitted as of right. In America, this could be viewed as another instrument of avoidance. The highest court in Japan does not have this option to refuse to accept cases and a leading Japanese scholar notes this often results in

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90. *Id.* at 79-84.

91. *See* Spiliotopoulos, *supra* note 84.

92. *See* TARNOPOLSKY & BEAUDOIN, CANADIAN CHARTER OF RIGHTS AND FREEDOMS (1982).

93. *Id.* at 10-12.

94. *See* Berger, *supra* note 33, at 300-301.

an overload with less careful drafting of opinions.[95] Of course this is of concern where the important tasks of constitutional review is involved.

IV. A PERSPECTIVE ON THE USE OF CONSTITUTIONAL JUDICIAL REVIEW IN THE HONG KONG SAR

The above theories and structural elements could well provide some new ingredients in what is a growing constitutional dialogue in Hong Kong. In some respects, discussion of constitutional implementation has suffered from the press of other compelling issues. It may also suffer from the press of history. Neither the Chinese participants nor the English trained common law lawyers involved in this constitution building process come from legal traditions that currently employ constitutional judicial review of legislation. England has benefited, as has Hong Kong in a subsidiary fashion, from a tradition of rights implementation which depends both on the heavy weight of English tradition and custom, and on an independent and strongly effectual judiciary which has built up a constitutional dialogue through other techniques such as legislative interpretation and judicial review of administrative acts. Nevertheless, even the United Kingdom, outside its heartland, has tended to favor use of constitutional judicial review in its former colonies, as indeed it is so employed in most.[96]

Chinese attitudes on constitutional review, constitutional government, and human rights, likewise bear the weight of history; recent and ancient. Without taking up all of this weight, which has been the topic of a recent book,[97] particular aspects may be worthy of note. As noted

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95. Tanaka, *Legal Equality Among Family Members in Japan -The Impact of the Japanese Constitution of 1946 on the Traditional Family System*, 53 S. CAL. L. REV. 611, 616 (1980).

96. It has been pointed out that although England has employed parliamentary supremacy since the Glorious Revolution of 1688, this doctrine in some respects produced the opposite result in the British colonies, empowering colonial judges to disregard local legislation not in conformity with English law. *See* Capelletti, *supra* note 22, at 40. It has been reckoned that more than 600 colonial laws were invalidated by the Privy Council from 1696 to 1782. *See id.* Canada, Australia and India have likewise adopted constitutional judicial review, while South Africa, with perhaps a more troubled rights record, has not. *Id.* at 41. While Hong Kong does not have a tradition of constitutional judicial review of legislation, it does have a British system of judicial review of administrative acts. Though without a written bill of rights Hong Kong also has some confined and virtually unemployed means for courts to review legislation. *See* Wesley-Smith, *Legal Limitations Upon The Legislative Competence of the Hong Kong Legislature*, 11 HONG KONG L. REV. 3-13 (1981). Most noteworthy is a limited power of review for conformity to acts of the British Parliament. Rediffusion (H.K.) Limited v. Attorney General, 1968 H.K.L.R. 277 (Sup.Ct.); Rediffusion (H.K.) Limited v. Attorney General, 1970 H.K.L.R. 231 (Privy Council); regarding an application by the Attorney General, 1985 H.K.L.R. 381 (High Court). As a practical matter such power is rarely exercised, and Hong Kong generally adheres to the British tradition in this respect. Given the experience in other former British overseas possessions, however, building a system of constitutional judicial review on this base would be very much within the scope of Hong Kong's current legal tradition.

97. EDWARDS, MENKIN, NATMAN, *supra* note 14.

above, Professor Edwards and his colleagues have pointed out certain Chinese differences in the conception of rights as an instrument of policy to advance the goals of the state and not as a claim against the state. They have also noted the absence of a tradition and process for adversarial claims of rights, which has grave impact for rights development. It should also be noted that the period during which China borrowed Western legal institutions and constitutionalism, largely from Germany, was a period during which Germany had a lapse in use of constitutional judicial review.[98] While Germany had implemented a system of constitutional review in the middle of the 19th century, that system had fallen out of use in the latter part of the 19th century and the first half of the 20th century. Of course this period also witnessed increased abuse of rights in Germany, culminating in the Nazi regime of Adolf Hitler. All of the axis countries implemented constitutional review as a safeguard against such development in the post-war period. The current German system is especially effective. With France likewise not favoring judicial review, the Western influence on the Chinese legal system had not in the early years included this ingredient to a marked degree. More recently, the Soviet Union and Marxist states (except Yugoslavia) likewise lack such institution.[99]

Rather than accepting the fruits of history and social policy being employed in other contexts, one might better focus on the value of this concept with reference to the goals the participants share for Hong Kong's future. Such an examination not only favors constitutional review as a way to implement the Basic Law, but also gives some preliminary indication of the structural and theoretical components best considered.

Generally one might conclude that the institution committed to the incremental evolution of higher norms and principles in the process of dialogue, discussed above, may well advance the common goal of all participants of maintaining stability. With fundamental value differences evident in the political systems of Hong Kong and the rest of China, there is a great deal of potential for confrontation on fundamental issues in the political arena; the arena, in Bickel's view best suited to more immediate issues of policy and expediency. The Basic Law drafting process has already revealed some of this in debates over such topics as direct elections, accountability and residual powers. For Hong Kong to go into its future legislative process with constant signals of approval or disapproval from the central government, as a basis for proceeding, as has occurred with

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98. For an outline of German historical development of constitutional judicial review *see* Casper, *Guardians of the Constitution*, 53 S. CAL. L. R. 773, 775-778 (1980). With limited exception (1929), there was general hostility to this concept from 1871 up to the demise of the Nazi regime, a period which would encompass Chinese exposure to German legal traditions. France, another source of Chinese exposure to modern constitutional systems, has likewise had a tradition of hostility to constitutional judicial review, tradition which is only now starting to break down. *See supra* note 67. France, however, like England, has vigorously employed administrative judicial review.

99. *See supra* note 66.

Basic Law drafting, seems an inherently unstable and perhaps undesirable way to proceed. In a system that tends to shift all issues into the political arena of the legislative or executive branches, the chances are good, with fundamentally different views on rights and democracy, that other hot fundamental issues will someday emerge to replace the current ones. While constitutional judicial review will not completely purge these sensitive issues from the political arena (nor should it), it tends, as Bickel suggests, to render the dialogue in this area more ordered and thus advances stability. The judiciary has a greater potential to insulate itself from the more aggressive political debate than perhaps other supposed stability generating political bodies that have been mentioned from time to time in Hong Kong, e.g., a large appointed group of senior advisers. No one would suggest that the court is totally insulated, nor should it be, in informing its constitutional dialogue.

My initial feeling is that Hong Kong might best benefit from use of a bifurcated system. At the local level this would include a decentralized incidenter system of judicial review similar to the one employed in most common law jurisdictions (all common law jurisdictions with written constitutions or basic laws). This system should be employed, permitting the local judiciary at all levels, bound by the highest court's precedent, to review the acts of the legislative branch, as well as the executive branch, for conformity to both the powers and rights components of the Basic Law. This should generally include the full extent of the Basic Law. Yet, being part of a national system based initially on civil law traditions, certain components of a centralized principaliter system could be used to resolve constitutional issues involving constitutional power or jurisdictional questions between the central and local government or questions involving the constitution of the People's Republic of China. This latter feature would preserve national authority in areas of national concern; yet it is anticipated that it would rarely, if ever, be employed because of its limited field of coverage and the ability to resolve most such issues in the Basic Law itself.[100] A special committee composed of an equal number of Hong Kong and mainland compatriots could be set up either in the NPC or independent of it. To satisfy any question under Article 67 of the PRC Constitution, the Basic Law could expressly delegate such power to the local courts and the special committee as indicated. To preserve autonomy and the independence and finality of local courts, I would permit

100. The Basic Law and any revisions of Article 31 of the Constitution of the Peoples Republic of China should seek to resolve all such issues to the extent possible and this latter institution should stand more as a symbol of national authority and be available to avoid a constitutional crisis within the limited areas indicated. In the latter respect such an institution seems eminently more preferable than political avenues often evident in current debate over the Basic Law. This solution of the problem does not require any conflict with Article 67 of the Constitution of the PRC since such a system of local constitutional judicial review could already be considered authorized by Article 31 and the Joint Declaration and/or could be delegated in the Basic Law. The concern here is with achieving the objectives of the Joint Declaration in a manner satisfactory to both levels of government.

referral of constitutional issues to the special committee only by the SAR executive or ⅔ of the legislature and by an appropriate organ of the central government. Local courts would not make such referral, exercising their constitutional judicial review independently. With this limited exception, all other constitutional judicial review would be vested in the local Hong Kong courts, along with the power of final adjudication. Local courts would ultimately be held in check by the amendment power though the rather conservative Hong Kong courts are unlikely to move beyond the general values of the Hong Kong community or mainland China's expectations.[101] Numerous reasons can be advanced both for employing constitutional review generally, and for using this particular decentralized incidenter system with limited supplementation as indicated. Some of these arguments are efficiently suggested in the following ten points.

1. The current British approach to rights development under a system of parliamentary supremacy may not be realistic outside of the British cultural and political context.

2. Constitutional review seems more appropriate to a written constitution and is generally so employed in most common law jurisdictions.

3. Pure reliance on mainland style legislative implementation seems

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101. There should be no serious concern with the ability of Hong Kong's common law courts to exercise restraint within certain limited areas of national concern. Under the American political question doctrine, the common law courts in the United States have shown similar restraint with respect to issues more appropriately left to other branches of government. Within the foreign affairs area the English act of state doctrine reveals such restraint, as does the rather different act of state doctrine in United States. Under the English act of state doctrine "an act of state is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts." 18 HALSBURY, LAWS OF ENGLAND, § 1414 (4th ed.). An act of state is defined as a "prerogative act of policy in the field of foreign affairs performed by the Crown in the course of its relationship with another state or its subjects". *Id.* § 1413. It includes matters such as entering treaties, declarations of war, annexation of land, etc. *Id.* The occasion for restraint under the American act of state doctrine arises with reference to sovereign acts of foreign states and is principally concerned with notions of separation of powers in the American government. Banco Nacional de Cuba v Sabbatino, 376 U.S. 398 (1964); *see generally* Davis, *Domestic Development of International Law: A Proposal for an International Concept of the Act of State Doctrine*, 20 TEX. INT'L L. J. 341 (1985). It is for the courts to determine the occasion for applying the political question doctrine and the act of state doctrines. This tradition of restraint by common law courts should adequately address any concern with Hong Kong courts aggressively intruding on areas of national concern, including any inappropriate intrusion on China's retained Powers over foreign and defense affairs for Hong Kong. *See* Joint Declaration, paragraph 3(2). In such areas common law courts are appropriately equipped to the determine occasion for restraint. Such occasion for restraint will also occasionally arise with respect to Hong Kong's exercise of foreign affairs in those areas where it has retained such power (e.g. commercial relations) under the terms of the Joint Declaration. On other occasions such restraint may be unnecessary with respect to an issue concerned with foreign or defense affairs. While this line is difficult to draw, within the Hong Kong context, the common lawcourts may generally be best suited for this task. The constitutional committee can in effect serve as a back up devise in this sensitive area and symbolize national authority. Yet, the Hong Kong courts should interpret the entire Basic Law independently and without being subject to appeal to higher authority.

unlikely to achieve a rights commitment that would be trusted and would thus cause considerable local tension and instability, not to mention offense to the notion of autonomy and "one country, two systems."[102]

4. Current discussions in the Basic Law Consultative Committee suggest general agreement on employing separation of powers with checks and balances, as opposed to the separation of functions approach often evident in French style civil law systems, suggesting the appropriateness of a more common law approach.

5. Yet, as is true of the function of the French Constitutional Court, a special committee employing a centralized principaliter system may function well for the limited purpose of functional separation of powers between the local and national government, as well as providing an expression of national authority.

6. The existing use of common law and *stare decisis* in Hong Kong likewise favors the common law decentralized incidenter system, as does generally the education and training of the local judiciary and lawyers.

7. Decentralized judicial review with access to avoidance techniques or passive virtues, may better take advantage of the dialogue based evolution of principles in general, in common law systems and of rights in particular.

8. Decentralized incidenter judicial review offers more avenues for evolutionary change in fundamental values with less risk of serious confrontation, thus advancing political stability and human rights commitments.

9. The existing legal system in Hong Kong already contains the ingredients for such a system and would thus permit continuity and permit Hong Kong to employ other common law precedent.

10. Hong Kong and thus China would be able to participate in a growing international commitment to employing proper processes in the implementation of human rights.

Constitutional judicial review embodies a recognition of, and a commitment to, the basic values of a society. A constitution or a basic law is not a mere statute but is instead some indication of the way a given society constitutes itself. Yet it may at best be an outline of a society's basic values, one that hopefully rises to the demands placed upon it. One intuitively senses that the chances of the success of this enterprise are enhanced if the impetus for value growth comes from within the society that the basic law governs. The almost geometrical growth in use of the

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102. It should be noted that while this reference is to placement of such power in the legislative branch of the central government, it would also not be satisfactory to transfer the central system of legislative implementation to the local government. This would not take advantage of this dialogue based system of value development and implementation and would likewise tend to politicize to a higher degree basic value development. This would of course give rise to the same destabilizing forces. On the level of higher law development. employment of common law courts in the central role with legislative bodies constituting the other side of the dialogue seems much more conducive to a stable democratic process, advancing the shared goals of all participants.

instrument of constitutional judicial review in recent years reflects a growing recognition of the importance of the process of value formulation and the utility of an independent, less politicized institution for this process. Such an institution may serve to provide stable direction to the collective constitutional dialogue.

The Joint Declaration reveals a prominent commitment to stability, capitalist economy, and human rights in a common law framework, as well as autonomy and self determination. These concepts collectively provide the outline of a pluralist, liberal capitalist system. While many ingredients must coalesce to achieve certain shared goals, evidence suggest that constitutional review could be employed as an effective motor to drive this system on the level of fundamental values development and stability enhancement. Constitutional review cannot achieve the expectations placed upon it without many other ingredients and political commitments. It does not function independently of the polity. It is more like one side of a conversation. Yet evidence suggests that those other ingredients and commitments may well be present in Hong Kong. If not the enterprise will likely fail in any event.

It cannot be stressed enough that this concept of the judiciary and constitutional review, as one side of a conversation designed to articulate our basic values, is a concept that depends on the other participants in this conversation. The people, not the courts alone, are the real guardians of liberty. Until now, a British political process has afforded Hong Kong a degree of protection, but that will not be true of the future. If the political process of the future does not engage the people and their representatives in this dialogue, then the rights of the citizen will not be protected. That is the nature of the dialogue in question. Judges are not isolated from the values of the polity. While they may be more reflective participants, less troubled by expediency, they are of necessity participants, as they must be to carry out their mission of value development through constitutional judicial review.

The Hong Kong experiment in constitution building has many unique qualities. The concept of "one country, two systems" has never been tried before, at least with reference to two systems with such a radically different value base. While unique, this effort also shares common ground with other constitution drafting efforts in the world. As is true of many constitutions, observers, both at home and abroad, will be especially attentive to the potential for successful implementation of the constitutional scheme. The Hong Kong case tends to dramatize this concern. As Hong Kong compatriots and other interested parties contemplate their confidence in the future success of "one country, two systems," they will no doubt consider whether China's leaders have demonstrated a will to implement the constitutional scheme and the high degree of autonomy promised in the Joint Declaration. Such demonstrated will depends in part on the legal content that has been given to interpreting and applying the Basic Law. Whatever model is ultimately adopted, the complex factors discussed herein may inform our judgments about the final product

and its likelihood of success. In the interim, we can only hope that all of these concerns will be addressed before a final model is adopted. At a minimum, this process will certainly prove instructive about the enterprise of comparative constitutional law.

The War Powers Resolution: Conflicting Constitutional Powers, the War Powers and U.S. Foreign Policy*

BRADLEY LARSCHAN**

I. INTRODUCTION

Fourteen years, some practical experience and several Supreme Court decisions have passed since the War Powers Resolution[1](WPR) was enacted over a Presidential veto on November 7, 1973.[2] Since then, the United States' foreign policy has grappled, with varying degrees of success, with this unique legislation, which seeks to control the Executive's use of armed force in situations short of war. The effectiveness of this legislation has been problematic at best[3] and its future is clouded by lingering questions as to its constitutionality and, on a policy level, by concerns about the potential use of U.S. armed forces with respect to, among other things, international terrorism.[4]

This paper will examine briefly the political and legislative history[5] of the War Powers Resolution. It will then set the War Powers Resolution in historical perspective by analyzing the original intention of the Fram-

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1. Pub. L. 93-148, § 2, 87 Stat. 555, (codified at 50 U.S.C. § 1541 (1973)).

2. H.R.J. Res. 542, 93d Cong., 1st Sess., 119 CONG. REC. 24,707-708 (1973). President Nixon vetoed the bill Oct. 24. *Veto of War Powers Resolution,* 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 29, 1973). The House overrode the veto (284-135), 119 CONG. REC. 36,202, 36,221 (1973), as did the Senate (75-18), 119 CONG. REC. 36,174, 36,198 (1973).

3. Turner, *The War Powers Resolutions: Unconstitutional, Unnecessary and Unhelpful,* 17 LOY. L.A. L. REV. 683 (1984).

4. *See, e.g., The testimony of the State Department's Legal Adviser of April 29, 1986, before the Subcommittee on Arms Control, International Security and Science of the House Committee on Foreign Affairs, reprinted in* BUREAU OF PUBLIC AFFAIRS, DEP'T STATE, CURRENT POLICY No. 832, THE WAR POWERS RESOLUTION AND ANTITERRORIST OPERATIONS 1 (1986).

5. For a comprehensive account of the legislative history of the War Powers Resolution, see H.R. DOC. No. 287, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 2346.

ers of the Constitution from a domestic and international legal perspective. This paper analyzes the fundamental constitutionality of sections 5(b)&(c) of the War Powers Resolution, as well as the Resolution's constitutionality in light of the legislative veto cases. Finally, it will examine the policy aspects of sections 5(b)&(c) of the War Powers Resolution, especially as they relate to the U.S. response to international terrorism.

A. Historical Development of the War Powers Resolution

The War Powers Resolution was born of Congressional frustration over the United States' prolonged military involvement in Vietnam,[6] the second most divisive conflict in our history. The WPR was the culmination of Congressional efforts to curtail Presidential authority to commit American troops into combat, beginning with the 1967 Senate Foreign Relations Committee Hearings[7] and Report.[8] Under the stewardship of Senator J. William Fulbright, a sense of the Senate Resolution was adopted in June 1969 proclaiming that "a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States government by means of a treaty, statute, or concurrent resolution of both Houses of Congress, specifically providing for such commitment."[9]

This country's involvement in Vietnam continued, however, as did Congressional attempts to control (short of requiring complete withdrawal), the President's discretion to commit U.S. forces in Southeast Asia.[10] Following the announcement of the 1973 ceasefire agreement, the Congress passed the Cooper-Church amendment[11] and the Mansfield

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6. J. JAVITS, WHO MAKES WAR: THE PRESIDENT VERSUS THE CONGRESS 268-71 (1973).

7. *U.S. Commitments to Foreign Powers: Hearings Before the Senate Comm. on Foreign Relations on S. Res. 151*, 90th Cong., 1st Sess. (1967).

8. *See* SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, S. REP. No. 797, 90th Cong., 1st Sess. (1967). Many of the questions raised in the report questioning the President's constitutional authority have been answered by the Executive branch. *See, e.g.*, Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12 (1976).

9. On the effects of a concurrent resolution, see Sofaer, *id.*

10. *See* A. THOMAS & A. THOMAS JR., THE WAR-MAKING POWERS OF THE PRESIDENT 119-28 (1982).

11. The Cooper-Church amendment to the Department of Defense Appropriations Act of 1970, § 643, 83 Stat. 469, provides that "none of the funds appropriated by this Act shall be used to finance the introduction of American combat troops into Laos or Thailand." The Cooper-Church amendment to the Special Foreign Assistance Act of 1971, § 7, 84 Stat. 1942, provides:

> (a) In line with the expressed intention of the President of the United States, none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia.
>
> (b) Military and economic assistance provided by the United States to Cambodia and authorized or appropriated pursuant to this or any other Act shall not be construed as a commitment by the United States to Cambodia for its

amendment.[12] These amendments forbade use of government funds for American military activities in Indochina "unless specifically authorized" by Congress. The Congress then approved a measure to cut off all funds for U.S. combat activities in Cambodia and Laos. This measure, however, was vetoed by President Nixon and an attempt to override the veto failed.[13] President Nixon was compelled, for political reasons, to agree to a "compromise" on July 1, 1973 in which funds for military activities in Laos and Cambodia were cut off on August 15, 1973.[14] The President agreed thereafter to seek congressional authorization for further military activities in Indochina.[15]

During this period, a more subtle and yet infinitely more important struggle was taking place. There was a clash of constitutional titans for

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defense.

12. The Mansfield amendment to the Military Procurement Act of 1972, § 601(a), 85 Stat. 430, provides:

> It is hereby declared to be the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date certain, subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces. The Congress hereby urges and requests the President to implement the above-expressed policy by initiating immediately the following actions:
>
> (1) Establishing a final date for the withdrawal from Indochina of all military forces of the United States contingent upon the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces.
>
> (2) Negotiate with the Government of North Vietnam for an immediate cease-fire by all parties to the hostilities in Indochina.
>
> (3) Negotiate with the Government of North Vietnam for an agreement which would provide for a series of phased and rapid withdrawals of United States military forces from Indochina in exchange for a corresponding series of phased releases of American prisoners of war, and for the release of any remaining American prisoners of war concurrently with the withdrawal of all remaining military forces of the United States by not later than the date established by the President pursuant to paragraph (1) hereof or by such earlier date as may be agreed upon by the negotiating parties.

13. The Constitution provides for an override of a Presidential veto by a two-thirds vote of the Congressmen present in each house, U.S. CONST. art. I, § 7, cl. 2, providing there is a quorum. Missouri Pacific Railway Co. v. Kansas, 248 U.S. 276 (1919). A quorum is a majority of the members of each house. *Id. See also* Senate Rule 6, para. 1.

14. Act of July 1, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973). The Act provided:

> None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam or off the shores of Cambodia, Laos, North Vietnam and South Vietnam by the United States forces, and after August 15, 1973, no other such funds heretofore appropriated under any other Act may be expended for such purposes.

15. *See* 87 Stat. 99.

the control of U.S. foreign policy. The "Imperial Presidency" was under siege by an assertive and powerful Congress. Since Franklin Roosevelt's Presidency, the American Chief Executive's powers swelled on all things touching foreign policy. The United States had emerged as the first Superpower. Moreover, it was the only Western democracy in a position to halt Soviet expansionism in what remained of war-torn Europe and other areas of the globe. Of the two political branches of government, it was the Presidency which was best equipped to meet the challenge of and to respond quickly to political and military crises. Congress watched from the sidelines as the Presidency grew increasingly independent of the legislative branch on matters of foreign policy.

Prior to Watergate, it was not the Congress but the Supreme Court that had checked the growth of presidential power over foreign affairs.[16] The Congress became frustrated as Presidents committed this country to a series of controversial policies, including the Berlin airlift, Korea, NATO, the Bay of Pigs, the Congo rescue operation, intervention in the Dominican Republic and the Cuban Missile Crisis. It was not until the Nixon Presidency was confronted with the dual political crises of Watergate and Vietnam that the Congress was able to reassert itself. When it did, it was with a vengeance. With an active and increasingly powerful Congress confronting a President whose personal and political powers were waning, the stage was set for the introduction of the War Powers Resolution.[17]

B. Promulgation of the War Powers Resolution

Two provisions contain the heart of the War Powers Resolution, which Professor Gerald Gunther characterized as "an unusual, quasi-constitutional variety of congressional action, delineating not substantive policy but processes and relationships."[18] Section 5(b) requires the President to withdraw U.S. forces from hostilities or situations of imminent hostilities within 60 or 90 days, unless Congress either declares war or specifically authorizes continued military activities. Section 5(c) requires the President to withdraw U.S. forces if directed by a concurrent resolu-

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16. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) [hereinafter cited as Steel Seizure Case]. It is interesting that this case has become the dumping ground of constitutional reasoning, and is often invoked to support the thesis that war powers belong, by negative implication, to the Congress. *See, e.g.*, Buchanan, *In Defense Of The War Powers Resolution: Chadha Does Not Apply*, 22 HOUS. L. REV. 1155, 1162, n. 26 (1985). For a discussion of the circumstances leading up to and including the Steel Seizure Case, see M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977); A. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE: YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER, THE STEEL SEIZURE DECISION (1958).

17. The War Powers Resolution was conceived and zealously promoted by Senator Jacob K. Javits, who has written extensively on the subject. *See, e.g.*, J. JAVITS, WHO MAKES WAR; THE PRESIDENT VERSUS CONGRESS, *supra* note 6.

18. G. GUNTHER, CONSTITUTIONAL LAW 371, n. 4 (11th ed. 1985).

tion.[19] It should be emphasized that the concurrent resolution was chosen quite deliberately by the WPR's drafters as a device to avoid the constitutionally-required two-thirds vote of each House to override a Presidential veto, so that a simple majority vote would replace the presentment process.[20]

President Nixon rejected the War Powers Resolution. In his October 1973 veto message, he stated that it was "dangerous to the best interests of our nation," and "that both these provisions [Sections 5(b)&(c)] are unconstitutional. The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution . . . and any attempt to make such alterations by legislation alone is clearly without force."[21]

In the view of this writer, President Nixon was correct on both grounds. The War Powers Resolution is bad public policy and it is unconstitutional. It impairs the President's flexibility to project military power as an instrument of American foreign policy. Moreover, it is unconstitu-

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19. A concurrent resolution is to be distinguished from a joint resolution in that the former is intended to become operative after it is approved by each house of Congress while the latter is subject to Presidential disapproval and Congressional override. *See generally* JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES §§ 396-97, H.R. Doc. No. 403, 96th Cong., 2d Sess. (1979).

20. *See* Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?* 16 WM. & MARY L. REV. 823, 844-49 (1975). During the congressional debate on the War Powers Resolution, Rep. Zablocki observed that, were it otherwise, "[o]ne-third of either body will thwart the will of the majority." 119 CONG. REC. 24,689 (1973). *See also* War Powers Resolution of 1973, H.R. REP. No. 287, 93d Cong., 1st Sess. 11 (1973).

21. "Veto of War Powers Resolution," *supra* note 2.

Every Chief Executive since President Nixon has complied with the War Powers Resolution but has explicitly stated that Sections 5(b) & (c) are without constitutional force. For instance, in his signing statement enacting into law the Multinational Force in Lebanon Resolution, Pub. L. 98-119, 97 Stat. 805, *reprinted in* 19 WEEKLY COMP. PRES. DOC. 1422 (Oct. 17, 1983). President Reagan said:

> I believe it is, therefore, important for me to state in signing this resolution that I do not and cannot cede any of the authority vested in me under the Constitution as President and as Commander-in-Chief of the United States armed forces. Nor should my signing be viewed as any acknowledgement that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in Section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired or that Section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy the United States armed forces.

Former President Gerald R. Ford noted in a 1977 lecture that "[t]he United States was involved in six military crises during my presidency . . .. In none of those instances did I believe the War Powers Resolution applied . . .. Furthermore, I did not concede that the resolution itself was legally binding on the President on constitutional grounds." "The War Powers Resolution: Striking a Balance between the Exectuive and Legislative Branches," speech by former President Gerald R. Ford, University of Kentucky, Louisville (Apr. 11, 1977), *reprinted in A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 325, 327 (1977) (statement of Pres. Gerald R. Ford).

tional on two grounds: at least part of it is a legislative veto of the type found unconstitutional in *Immigration and Naturalization Service v. Chadha* [22] and *Consumers Union, Inc. v. FTC.*[23] The WPR also violates the constitutional doctrine of separation of powers, depriving the President by means of mere statute (and against his will) of certain powers vested in the Executive by the Constitution and reassigning those powers to the Congress.[24]

II. MECHANICS OF THE WAR POWERS RESOLUTION

Congress' stated purpose in enacting the WPR was to:

> fulfill the intent of the framers of the Constitution . . . and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances and to the continued use of such forces in hostilities or in such situations.[25]

The WPR seeks to apply this "collective judgment" to three classes of activities involving American armed forces[26] (unless war has been declared by the Congress). It is triggered where U.S. troops are introduced:

1. "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;"

2. "into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces;" or

3. "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."[27]

Under the War Powers Resolution, three discrete duties are imposed upon the President:

1. He must consult the Congress prior to committing United States armed forces "in every possible instance".[28]

2. Once U.S. armed forces are deployed, he *must* submit a written

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22. 462 U.S. 919 (1983).

23. 691 F.2d 575 (D.D.C. 1982), *aff'd mem. sub nom.*, Process Gas Consumer Group v. Consumer Energy Council of America, Inc., 463 U.S. 1216 (1983), *reh'g denied*, 463 U.S. 1250 (1983).

24. Sec. 8(d) of the WPR expressly states that the War Powers Resolution does not alter the constitutional authority of the President. This is not only a self-serving statement, but also is an erroneous legal conclusion, for the reasons set forth below.

25. 50 U.S.C. § 1541(a) (1982).

26. Actually, the three types of activities are explicitly set forth in § 4(d), the "reporting requirement." Sec. 5(b) attempts to include these activities by reference, covering "any use . . . with respect to which such report was submitted (or required to be submitted)." Sec. 3 applies only to forces introduced into hostilities or imminent hostilities.

27. 50 U.S.C. § 1543(a)(1)-(3) (1982).

28. 50 U.S.C. § 1542 (1982).

report to the Speaker of the House of Representatives and the President *pro tempore* of the Senate explaining (a) why the troops were committed; (b) the President's legal authority to deploy the forces; and (c) the "estimated scope and duration of the hostilities or involvement."[29] If the U.S. involvement continues, the President must report to the Congress periodically, but no less than every six months.

3. He must end the projection of American military power unless the Congress takes positive action to authorize its continued use.

Section 5(b)[30] requires affirmative congressional action to continue the deployment or engagement of U.S. forces in an area of hostilities.[31] Under Section 5(b), the President must withdraw U.S. armed forces within 60 days unless both Houses of Congress agree, by concurrent resolution, to continue American involvement. If either or both Houses of Congress fail to authorize continued U.S. military involvement, through action or inaction, the 60 day period may be extended automatically for not more than an additional 30 days "if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about" their prompt removal.[32]

Section 5(c) provides that Congress may, by concurrent resolution, require the President to remove U.S. armed forces at any time, notwithstanding the 60 day provision in Section 5(b). The concurrent resolution may be adopted by a simple majority of both Houses. Since it is not to be presented to the President, a concurrent resolution is not subject to a presidential veto.

Finally, the WPR contains a separability clause which provides that if any provision is found to violate the Constitution, the remainder of the WPR is to continue in effect.[33]

III. THE WAR POWERS RESOLUTION'S UNCONSTITUTIONALITY

A. *Section 5(c): Violates the Presentment Clause*

Section 5(c), which has never been invoked by Congress, is clearly unconstitutional.[34] Article I, § 7, cl. 2 of the Constitution requires that

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29. 50 U.S.C. § 1543(a)(A)-(C) (1982).

30. 50 U.S.C. § 1544(b) (1982).

31. "Hostilities" are not defined in the WPR. However, one definition is found in the Report of the House Foreign Affairs Committee on H.J. Res. 542, 93d Cong., 1st Sess., *quoted in* Comment, *A Tug of War: The War Powers Resolution and the Meaning of "Hostilities,"* 15 PAC. L.J. 265, 282 (1982).

32. *Id.*

33. The constitutionality or effect, if any, of the severability clause is beyond the scope of this paper. For a thought-provoking discussion, see Tribe, *The Legislative Veto Decision: A Law By Any Other Name*, 21 HARV. J. ON LEGIS. 1, 21-27 (1984).

34. *See infra* text accompanying notes 35-51. *See also* Lungren & Krotoski, *The War Powers Resolution After The Chadha Decision*, 17 LOY. L.A.L. REV. 767, 777 (1984), Tur-

every bill passed by the Congress "shall, before it become a Law, be presented to the President of the United States."[35] Since a concurrent resolution is a unilateral congressional action, and not presented to the President, it violates the presentment clause.[36] Of course, the enactment of the War Powers Resolution in itself met the requirements of the presentment clause. But the effect of Section 5(c) is to amend the presentment clause as it applies to future congressional acts. Put another way, Section 5(c) is nothing less than a unilateral attempt to effect an ongoing

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ner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful, supra* note 3, at 684; Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571, 577 (1984).

35. A concurrent resolution, for purposes of constitutional analysis, would be considered a bill. But even if it weren't so considered, clause 3 provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Clause 3 was inserted precisely to prevent a measure from being enacted by Congress without Presentment to the President. *See infra* text accompanying notes 40-42. The process of law-creation was intended to be cumbersome, with certain built-in time constraints, to prevent Congress from encroaching upon the President's powers. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 301 (M. Farrand ed. 1911). Presentment is also more than a procedural nuisance, since the Framers wanted the Congress to be apprised of the President's reasons for a veto and then to reconsider their actions in this light. *See infra* text accompanying notes 40-42.

36. The Supreme Court noted in *Chadha* that

> [n]ot every action taken by either house is subject to the bicameralism and presentment requirements of Art. I. Whether actions taken by either House are, in law and fact, an exercise of legislative powers depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in character and effect.

Chadha, 462 U.S. at 952. Any action legislative in character must be performed by passage in both houses and presentment to the President. *E.E.O.C. v. Ingersoll Johnson Steel Co.*, 583 F. Supp 883 (S.D. Ind. 1984).

In *Chadha*, the Court relied on an 1897 Senate committee report to determine what action constitutes an exercise of legislative power and thereby necessitating that a bill be presented to the President. 462 U.S. at 952. In the report, the Senate Committee on the Judiciary had been directed by the Senate to, among other things, report whether *concurrent resolutions* must be submitted to the President. "The Constitution," the report notes, "looks beyond the mere form of a resolution . . . and looks rather to the subject matter." S. Rep. No. 1335, 54th Cong., 2d Sess. 1 (1897). Thus, it is the legislative substance of the resolution, not necessarily the legal form, which is controlling. The report continued, "every exercise of 'legislative powers' involves the concurrence of the two Houses; and every resolution not . . . involving the exercise of legislative powers, need not be presented to the President." *Id.* at 8.

The Senate Committee found that, for an action to be an exercise of legislative power, the measure must "contain matter" which would properly be "regarded as legislative in its character and effect." *Id. Chadha* found that the immigration statute had a legislative effect because it altered the "legal rights, duties, and relations of persons, including [executive branch officials and others], all outside the legislative branch." 462 U.S. at 952.

restructuring of the Constitution by legislation.[37] It attempts to alter article I, § 7, cl. 2 by granting to Congress the power for all time to decide, by *simple majority*, without presentation to the Executive, that it may require a President to withdraw U.S. armed forces upon demand.[38] Thus, it is unconstitutional on its face.

Equally important, Section 5(c) subverts the delicate balance of the separation of powers.[39] In this sense, the presentment clause is part of the "checks and balances" and, as such, is a cornerstone of our constitutional framework. The Supreme Court has noted "[t]he records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers."[40] The Court went on to observe that:

> Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." As a consequence, Art. I, § 7, cl. 3 . . . was added.[41]

Writing in *The Federalist* No. 73, Alexander Hamilton observed that the President's veto power

> establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body. . . . The primary inducement to con-

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37. Although only recently addressed by the Supreme Court, the debate surrounding the Presentment Clause has been with us for some time.

> The issue was raised in connection with a proposed reservation to the Treaty of Versailles authorizing American withdrawal from the League of Nations by "concurrent resolution." Although the proposal was accepted by a majority of the Senate, several Senators expressed the view that it was unconstitutional, and President Wilson wrote in a letter to Senator Hitchcock, "I doubt whether the President can be deprived of his veto power under the Constitution even with his own consent." Clearly, neither a treaty nor an Act of Congress can amend the Constitution, and an alteration of the procedure provided in the Constitution for making any "order, resolution or vote" effective, would be such an amendment.

Wright, *The Power To Declare Neutrality Under American Law*, 34 AM. J. INT'L L. 302, 307-08 (1940).

38. It might be argued that Congress has the power without § 5(c), based on its constitutional mandate, to require the withdrawal of U.S. forces. But if this were true, why did Congress believe it necessary to promulgate § 5(c) to begin with? Why not simply pass a resolution mandating withdrawal? And why was it viewed as necessary to circumvent the Presentment Clause? *See supra* note 7.

39. *See infra* notes and text accompanying notes 109-120.

40. *Chadha*, 462 U.S. at 946, *citing* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 611 (3d ed. 1858); 1 The Records of the Federal Convention of 1787, *supra* note 35, at 21, 73-74, 97-104, 138-140, 181, 301-305.

41. *Chadha*, 462 U.S. at 946 (citations omitted).

> ferring the power in question upon the executive, is to enable him to defend himself; the secondary one is to encrease the chances in favor of the community, against the passing of bad laws, through haste, inadvertence, or design.[42]

During the constitutional debates, James Wilson stated that "[w]ithout such a self-defence, the legislature can at any moment sink [the Executive] into non-existence."[43] It was in this sense that the presentment clause question was central to the Supreme Court's landmark decision finding the legislative veto unconstitutional. In *Chadha*, the Court said that "[t]he decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed."[44]

Of course, *Chadha* dealt specifically with the one House veto,[45] while Section 5(c) may be seen as a two House veto.[46] But this ignores the fun-

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42. *The Federalist* No. 73 (A. Hamilton), *in* THE FEDERALIST PAPERS 372-73 (Bantam Classic ed. 1982), *quoted in Chadha*, 462 U.S. at 947. Of the 85 Federalist Papers, which first appeared on October 27, 1787, 26 discussed defense or foreign policy. Alexander Hamilton wrote 51 papers, James Madison 29 and John Jay 5. For a fascinating and well-written account of the events leading to the publication of The Federalist Papers, see R. MORRIS, WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION (1985).

The Federalist Papers were written to persuade the people of New York State to ratify the Constitution. One observer has noted that

> [t]heir practical wisdom stands pre-eminent amid the stream of controversial writing at the time. Their authors were concerned, not with abstract arguments about political theory, but with the real dangers threatening America, the evident weakness of the existing Confederation, and the debatable advantages of the various provisions of the new Constitution.

3 W. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE AGE OF REVOLUTION 258 (1957).

43. 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 151 (J. Elliot ed. 1845) [hereinafter cited as DEBATES]. *Accord id.* at 347 (Mason); *id.* at 344 (Ellsworth); *id.* at 345 (Madison).

44. *Chadha*, 462 U.S. at 947 (citations omitted). The Court went on to observe that "[i]t is beyond doubt that lawmaking was a power to be shared by both Houses and the President." *Id.* (citations omitted).

The Founding Fathers assumed that the Congress would become the "first among equals" in the federal government. For instance, based upon his experience, Madison believed there was "a tendency in our governments to throw all power into the Legislative vortex." He observed that legislative encroachment "was the real source of danger to the American constitutions," and suggested that this justified "the necessity of giving every defensive authority to the other departments that was consistent with republican principles." 5 DEBATES, *supra* note 39, at 345. *See also* L. FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 21-2 (1972).

45. Therefore, the issue of bicameralism was also presented in *Chadha*. However, the issue in *Chadha* revolved around the legislative veto of a certain express delegation of congressional authority to an administrative agency. *See generally* Ratner & Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A.L. REV. 715, 738, n. 99 (1984).

46. Sec. 5(c) requires the President to withdraw troops if so directed by a concurrent resolution of the Congress. This clearly is a two house veto. It is not clear, however, whether

damental ground upon which *Chadha* was based: that there must be a clear division in functions between branches, even though powers may be shared. It was upon this basis that a two House veto was held unconstitutional in *Consumers Union, Inc. v. FTC.*[47] In a *per curiam* order affirmed without opinion by the Supreme Court,[48] the District of Columbia appeals court, *en banc*, held unconstitutional Section 21(a) of the Federal Trade Commission Improvements Act of 1980, which provided that an FTC regulation would become effective unless disapproved by concurrent resolution of both Houses of Congress. The court found that Section 21(a) violated both the separation of powers and "the procedures established by Article I for the exercise of legislative powers."[49] If anything, the War Powers Resolution suffers from a greater constitutional infirmity because it addresses not an independent administrative agency but the Presidency. Section 5(c) is a legislative veto since it may act only in a unilateral manner. It is a legislative action that overrides executive decision.

There can be no more clear a violation of the presentment clause and the prohibition against the legislative veto than Section 5(c) of the War Powers Resolution.[50] From all outward appearances, it seems likely that

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§ 5(b) is a one or two house veto. Sec. 5(b) requires the President to withdraw troops after 60 days, subject to a 30 day extension, unless Congress (1) has declared war, (2) passed a concurrent resolution authorizing continued activities or (3) is physically unable to meet as a result of armed attack upon the country. Thus, joint action is required by the Congress.

It should be noted, however, that § 5(b) also may be a one house veto. For instance if the Senate approved Presidential action and the House rejected it, the President would be required (under § 5(b)) to withdraw U.S. forces by virtue of the action (or inaction) of one house of Congress. Lungren & Krotoski found that:

> Section 5(b) has a significant effect because the action or inaction of one House can terminate the use of armed forces abroad. While it is true that section 5(b) does not contain express language providing for a one House legislative veto, this is irrelevant since the operational force of the section is the functional equivlent [sic] of a one House legislative veto.

Lungren & Krotoski, *supra* note 34, at 785-86.

47. *Consumers Union*, 691 F.2d 575.

48. *United States House of Representatives v. Federal Trade Commission*, 463 U.S. 1216 (1982).

49. *Consumers Union*, 691 F.2d at 578.

50. Sec. 5(c) may be unconstitutional on another ground, depending upon the factual context, because it may conflict with the President's powers as Commander in Chief. *See A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations, supra* note 21, at 72, 74-5 (statement of former State Dep't Legal Adviser Monroe Leigh). This is especially true in the area of self-defense, which is a constitutional function of the President. *But see* § 2(c) of the WPR, which narrowly defines the President's powers as Commander in Chief. This led one observer to note that

> [t]he legislative veto provisions of section 5(c) would allow Congress unilaterally to determine whether or not to permit the use of the armed forces in cases of self-defense, for example. A power which lies in the domain of the Executive under the Constitution would thus be transferred to the control of Congress. No resolution of Congress is constitutionally capable of accomplishing this feat.

Statement of Monroe Leigh, *id.*, at 76.

the current Supreme Court[51] would strike down Section 5(c) as long as *Chadha* stands[52] (if the challenge surmounts the issue of justiciability).

B. *Section 5(b): Fundamental Constitutional Issues*

1. *Violates The Separation Of Powers*

A more detailed analysis is required to demonstrate that Section 5(b) violates the doctrine of the separation of powers and institutions.[53]

Section 5(b) requires the President to withdraw U.S. armed forces engaged in hostilities or imminent hostilities within 60 days, subject to a 30 day extension, *unless* war has been declared or both Houses of Congress specifically authorize an extension. Thus, both Houses of Congress must take affirmative action, by a simple majority vote on a concurrent resolution, to authorize the continued deployment of U.S. armed forces. Or, to put it the other way, the President is required to withdraw American forces if Congress fails to act.[54] Moreover, either House may block the use of American troops by a simple majority vote or by failing to address the issue.[55]

In *Chadha*, the Court found the legislative veto unconstitutional because it has "the purpose and effect of altering the legal rights, duties, and relations of persons, including [Executive branch officials], all outside

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The delegation of the Commander in Chief power is quite narrow. *See infra* text accompanying notes 139-49.

51. There is an aversion by the courts to reach the merits of war powers disputes. *See* Henkin, *Constitutional Issues in Foreign Policy*, 23 J. INT'L AFF. 222 (1969).

52. Apparently, Justice White reached the same conclusion. *Chadha*, 462 U.S. at 970-71 (White, J., dissenting).

53. *But see* Lungren & Krotoski, *supra* note 34, at 782-83 (arguing that *Chadha* has rendered § 5(b) unconstitutional *per se*). For a well-reasoned and precisely contrary view, *see* Buchanan, *supra* note 16 (arguing that the War Powers Resolution is unaffected by *Chadha*).

54. Unless Congress is physically unable to meet, in which case the President may continue to act. *See* § ____, WPR, *supra* note 1.

55. Arthur Schlesinger asks: "If one house of Congress could prevent the declaration or authorization of war, why should not a single house be able to prevent the continuation of undeclared or unauthorized war?" A. SCHLESINGER, THE IMPERIAL PRESIDENCY 306 (1973). This presupposes, of course, that the President did not have the original authority to commit U.S. armed forces to combat — a thesis with which I disagree as a matter of constitutional delegation of powers, and to which two centuries of practice stands in opposition. Moreover, the termination of hostilities is distinctly different, from a constitutional law perspective, from a declaration of war. *Cf.* 2 J. STORY, *supra* note 40, at § 1171 ("It should therefore be difficult in a republic to declare war, but not to make peace."). *See also* note 72, *infra*.

It is widely accepted that the President, as Commander in Chief, has the power to negotiate and enter into armistice agreements without Congress' consent. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 52 (1975). Similarly, the President has the constitutional authority to make executive agreements, while treaties require consent of the Senate. *See, e.g.*, United States v. Belmont, 301 U.S. 324 (1937). Finally, the constitution is quite precise as to the law-making process, a fact Prof. Schlesinger's reasoning overlooks.

the legislative branch."[56] The legislative effect of Section 5(b) is to terminate the Executive's use of armed force in the absence of express approval by both Houses within a short time frame. This can be done through Congressional inaction or by the "veto" of one House.

The only way to interpret Section 5(b) consistently with the prohibition against the legislative veto, is to assume that the decision to use American troops is assigned solely to the Congress by the Constitution.[57] As Fredrick S. Tipson, former chief counsel of the Senate Foreign Relations Committee, put it, under Section 5(b) "the president's authority to act in emergencies simply runs out in 60 days if Congress does nothing."[58] Under this view, the Constitution vests the Congress with the requisite war powers; the Congress has delegated to the President discretionary powers for only 60 days without further Congressional approval. This assessment of the war powers is premised upon the assumption that constitutional separation of powers and institutions accords the Congress, rather than the Executive, most of the War Powers. This paper will argue that the constitutional separation of powers and institutions is that once Congress has raised an army, appropriated funds for its support, approved pay scales and appointments, and promulgated rules for military conduct, it then falls to the President to use the armed forces in his capacity to conduct foreign policy in situations short of war. Because the War Powers Resolution is based upon a constitutional interpretation under which the Congress exercises certain Executive War Powers, it is a usurpation by the Congress of the President's power and, thus, a violation of the constitutional separation of powers.

2. *The Powers Shared*

In domestic affairs, the Constitution's sharing of power and responsibility are fairly clear. "In foreign affairs, it was often cryptic, ambiguous and incomplete."[59] Like other principal functions of national government, the War Power[60] is a "pattern of shared constitutional authority . . . not

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56. 462 U.S. at 952. The Court went on to state that "[t]he one-House veto operated in these cases to overrule the Attorney General and mandate Chadha's deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha's status." *Id.* The same may be said of the effect of one house voting against continued use of force, or inaction by either or both houses, under § 5(b).

57. *See, e.g.*, the comment of Rep. Clement Zablocki that "under the Constitution, Congress is given the exclusive power to commit troops into hostilities. Congress does not delegate this power to the President in the War Powers Resolution." Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A.L. REV. 579, 590 (1984).

58. Tipson, *The War Powers Resolution Is Constitutional and Enforceable*, A.B.A. J., March 1984, at 10, 14.

59. A. SCHLESINGER, *supra* note 55, at 2.

60. War has been defined as an international legal "state of armed hostility between sovereign nations or governments." 7 J.B. MOORE, DIGEST OF INTERNATIONAL LAW 154 (1906). The War Power of the federal government is more difficult to define. "This power is tremendous," said John Quincy Adams; "it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." *Quoted in*

an hermetic separation of powers, but a scheme of divided power — what Hamilton called an intermixture of powers, the only effective way to prevent a monopoly of power in any one branch of government."[61]

It is axiomatic that the Constitution divides the War Powers between the Executive and the Congress.[62] The Constitution does not address explicitly the issue of which branch of government has the power to decide to deploy U.S. armed forces in situations of hostilities or imminent hostilities. The Congress' War Powers are specifically enumerated in the Constitution. With respect to the use of force, Congress has the power to declare war,[63] to raise and support Armies,[64] to provide and maintain a Navy,[65] to make laws regulating the armed forces,[66] and to support the militia of the several states.[67]

The President's powers, by comparison, are described vaguely but are hardly less important. The "executive power" is vested in the President.[68] He is the Commander in Chief of U.S. armed forces,[69] as well as of the militia when called into federal service.[70] He also has the power to call forth the militia in certain circumstances.[71] The President has "declared

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United States v. Macintosh, 283 U.S. 605, 622 (1931).

> The war power of the national government is "the power to wage war successfully." It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of the war.

Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

> [T]he war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 426 (1934).

When used in this article, the War Power will refer to so much of that sweeping constitutional grant of power as is implicated by the War Powers Resolution, *i.e.*, the power to send U.S. armed forces into combat abroad.

61. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 847 (1972). *See also* Buckley v. Valeo, 424 U.S. 1, 121 (1976).

62. Hirabayashi v. United States, 320 U.S. at 93 ("The Constitution commits to the Executive and the Congress the exercise of the war power").

63. U.S. CONST. art. I, § 8, cl. 11.

64. *Id.* at cl. 12.

65. *Id.* at cl. 13.

66. *Id.* at cl. 14.

67. *Id.* at cls. 15 & 16.

68. *Id.* at art. II, § 1, cl. 1. *See infra* note 134.

69. *Id* at § II, cl. 1. *See infra* notes and text accompanying notes 135, 139-49.

70. *Id.*

71. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28-33 (1827); Luther v. Borden, 48 U.S. (7 How.) 1, 44-48 (1849); The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862); Sterling v. Constantin, 287 U.S. 378, 399 (1932). *Compare* U.S. CONST. art. I, § 8, cl. 15.

peace"[72] and proclaimed neutrality.[73] And, very early in our history, John Marshall observed that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[74] Indeed, the President may obligate the United States to other States

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72. This is a non-exclusive power which has been exercised unilaterally by the executive. The Supreme Court observed that " '[t]he state of war' may be terminated by treaty or legislation or Presidential proclamation." Ludecke v. Watkins, 335 U.S. 160, 168 (1948). *See also* Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 161 (1919); McElrath v. United States, 102 U.S. 426, 438 (1880); The Protector, 79 U.S. (12 Wall.) 700 (1871); United States v. Anderson, 76 U.S. (9 Wall.) 56, 70 (1869).

73. In 1793, when revolutionary France declared war on England, President Washington proclaimed U.S. "impartiality." (The international law term "neutrality" was avoided, Letter of Jefferson to Monroe, July 14, 1793, *in* 7 J.B. MOORE, *supra* note 60, at 1004, just as the international law term "blockade" was avoided in President Kennedy's "quarantine" of Cuba during the missile crisis. Address of Oct. 22, 1962 of Pres. Kennedy, 47 Dep't State Bull. 715 (Nov. 12, 1962); *Public Papers of the Presidents of the United States: John F. Kennedy, 1962* 806 (1963).) Several pro-French members of Congress vehemently denounced the action as infringing Congressional power. However, President Washington — outraged by the conduct of the French minister, the notorious Citizen Genet, who sought to entangle the fledgling nation in the European war and, among other things, issued letters of marque and reprisal from his American legation to U.S. merchantmen and established Prize courts in French consulates, B. ZIEGLER, THE INTERNATIONAL LAW OF JOHN MARSHALL 183 (1939) — believed the power was at least in part vested in the President. *See* H. LODGE, ALEXANDER HAMILTON 172-74 (1882). This dispute sparked the well-known Pacificus-Helvidius letters initiated by Alexander Hamilton and acrimoniously replied to by James Madison. *See generally Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793* (1845, *reprinted in* 1976). Similarly, following the outbreak of the First World War in August 1914, Pres. Wilson issued a proclamation of neutrality.

It should be noted, however, that in 1794, Congress passed the first Neutrality Act, 1 Stat. 381 (1794), and in 1917 passed another Neutrality Act, 40(1) Stat. 217 (1917).

74. The statement was made in the House of Representatives when Marshall was a Congressman debating the Jonathan Robbins affair. 10 Annals of Cong. 613 (1800), *reprinted in* 18 U.S. (5 Wheat.), App. 1, at 26 (1820). This phrase has been invoked repeatedly by the Supreme Court. *See, e.g.*, First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766-68 (1972); Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103, 109 (1948)(paraphrased); Hirota v. MacArthur, 338 U.S. 197, 208 (1948)(per curiam) (Douglas, J., concurring); United States v. Pink, 315 U.S. 203, 229 (1942); Ludecke v. Watkins, 335 U.S. 160, 173 (1948) (paraphrased) (Black, J. dissenting); United States v. Belmont, 301 U.S. at 330; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936); Goldwater v. Carter, 617 F.2d 697, 707 (D.C. Cir. 1979), *rev'd on other grounds*, 444 U.S. 996 (1979). *See also* REP. OF THE SENATE COMM. ON FOREIGN RELATIONS, Feb. 15, 1816, Compilation of Reports, 1901, 56th Cong., 2d Sess., Sen. Doc. 231, Vol. 8, p. 24 ("The President is the constitutional representative of the United States with regard to foreign nations."), *quoted in Curtiss-Wright, supra*, at 319. *See generally* Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 932-33 (1986).

Hamilton characterized this power as "the constitutional agency of the president[] in the conduct of foreign negotiations." *The Federalist* No. 75 (A. Hamilton), *supra* note 42, at 381. *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 164-65 (1978); L. HENKIN, *supra* note 55, at 45-50, criticizing this characterization of the President's powers as too sweeping and without constitutional foundation. *Cf.* Dames & Moore v. Regan, 453 U.S. 654, 661, *et seq.* (1981); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Assessment*, 83 YALE L.J. 1 (1977); Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-33 (1972).

through executive agreement, including certain military agreements, without the advice and consent of the Senate.[75]

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75. Under the Constitution, of course, the Senate must advise and consent to a treaty before the President may ratify it. U.S. CONST. art. II, § 2. The Supreme Court has held that a treaty must involve an issue "properly the subject of negotiations with a foreign country." Geofroy v. Riggs, 133 U.S. 258, 267 (1890). *See also* Weinberger v. Rossi, 456 U.S. 25. However, all international compacts are not treaties which require the "participation" of the Senate. U.S. v. Belmont, 301 U.S. at 330-31. *See also* U.S. v. Pink, 315 U.S. at 230. The parameters of the Executive's power to make international agreements is unresolved. L. TRIBE, *supra* note 74, at 170. *See also* State Dep't Circular No. 175, Dec. 13, 1955, *reprinted in* 50 AM. J. INTL. L. 784 (1956); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 119, Comment (1965). Dr. Guive Mirfendereski commented that the President's constitutional power to enter into sole executive agreements is narrow.

> The language in *Belmont* may lead some to conclude that there is a class of agreements that the President can ratify independent of the "advice and consent" of the Senate. Such a conclusion is untenable. The *Belmont* decision speaks of agreements whose ratification does not always require the *participation* of the Senate. In other words, not every agreement requires the *active* or *affirmative* exercise of the Senate's power of "advice and consent." The Senate's "advice and consent" — *i.e.*, approval — may take other forms: silence, implied approval, acquiescence. In fact, the presumption of congressional approval is upset only where the Congress does in some way resist the exercise of Presidential authority. *See Dames & Moore v. Regan*, 453 U.S. 654, 686-88 (1981). Therefore, in *Dames & Moore*, the Supreme Court found Congress' implicit approval to be "crucial" to its decision to uphold the President's power to bind the U.S. to a series of agreements with Iran for the release of U.S. citizens. 453 U.S. at 680. Furthermore, the Court went as far as to suggest that the ratification of agreements without the explicit advice and consent of the Congress is only so because of the Congress' decision not to require it. The Court took judicial notice of the fact that the Congress is quite capable of objecting to executive agreements, as it did with respect to a 1977 Executive Agreement with Czechoslovakia, forcing the Executive to renegotiate the claims settlement agreement. *Id.* at 688, n. 13.

Letter from Dr. Guive Mirfendereski to the author (Jan. 31, 1987) (discussing the issue of Presidential powers under the Constitution to engage in sole executive agreements). *See further* Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345 (1955); Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341 (1944). *See* the interesting discussion of the tension in the use of executive agreements as a method of the President's conduct of foreign policy, *in* Rehm, *Making Foreign Policy Through International Agreement*, *in* THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 126-38 (F. Wilcox & R. Frank eds. 1976). *See generally* United States v. Guy W. Capps, Inc., 204 F.2d 655, 660 (4th Cir. 1953), *aff'd on other grounds* 348 U.S. 296 (1955) ("The executive may not by-pass congressional limitations regulating . . . [imports] by entering into an agreement with [a] foreign country that the regulation be exercised by the country through its control over exports"); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 64, 109-10 (1801).

One of the most important executive agreements was the "Destroyers for Bases" arrangement of Sept. 9, 1940, between the United States and Great Britain, prior to the U.S. entry into the Second World War. E.A.S. No. 181 (1940). *See* 39 Op. Atty. Gen. 484 (Aug. 27, 1940). The U.S. traded 50 destroyers for 99-year leases on military bases in eight British possessions from Newfoundland to the Carribbean. In his memoirs on the war, Winston Churchill characterized the arrangement as "a decidedly unneutral act by the United States. It would, according to all the standards of history, have justified the German Government in declaring war upon them." 2 W. CHURCHILL, THE SECOND WORLD WAR: THEIR FINEST HOUR

It is clear that the Congress may prohibit the use of U.S. armed forces in certain areas by statute. It is also clear that it is the President who orders deployment of troops. Nowhere, however, does the Constitution specifically set forth which branch of government has the power to decide to deploy American forces in situations of hostilities or imminent hostilities. We must, therefore, indulge in constitutional interpretation. There are two principal methods of inquiry: first, to analyze the intent of the Founding Fathers; second, to examine the theoretical structure of the government—the separation of powers and institutions—to determine where the power reposes.

3. Original Intent

Any attempt to discern the original intent[76] of the Founding Fathers as a method of constitutional interpretation is, at best, a dubious affair. As John P. Roche observed:

> The prodigious outpouring of "authoritative" interpretations of the "original intent" of the Framers of the Constitution . . . is rather baffling to one who has spent almost 40 years laboring in the primary sources of 18th-century American constitutionalism. . ..
>
> What finally emerged was not a separation of powers but a separation of institutions: the President's veto is a legislative power of immense impact, as is the authority of the Federal judiciary to hold acts of Congress unconstitutional . . .. The Senate clearly moves in on executive power when it approves appointments, and if Hamilton's observations in Federalist 77 that "the consent of that body would be necessary to displace as well as to appoint" had ever been ranked as an "original intent," the President would really be locked in.
>
> [A]fter four decades I can sadly testify that not only do I not know the "original intent" of the Framers — a fantastic reification on its face — but I increasingly suspect that much of the time on many of the provisions they didn't either. I know what Madison thought of some things, what Hamilton thought about others, but have no to reason to believe their views were the accepted wisdom.[77]

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404 (1949).

The effect of the destroyers-for-bases arrangement may have been to move the U.S. from "neutrality" to the uncertain international legal status of "non-belligerency." In appealing to President Roosevelt for weapons in May 1940, Prime Minister Churchill urged the United States to "proclaim non-belligerency, which would mean that you would help us with everything short of actually engaging armed forces." *Id.* at 24-25. On the question of non-belligerency, *see, e.g.*, Wilson, *Some Current Questions Relating to Neutrality*, 37 AM. J. INT'L L. 651 (1943); Kunz, *Neutrality and the European War 1939-1940*, 39 MICH. L. REV. 719 (1940-1941). *Cf.* note 80, *infra*.

76. Reference to original intent is instructive on the broad structure of the government. On issues of detail, however, original intent is as often misleading as it is informative.

77. Roche, "A Constitution Short on Intent," *N.Y. Times*, May 18, 1986, at 24, col. 4.

Compare, for example, Hamilton's view of the constitutional authority to direct the use of force, 4 THE WORKS OF ALEXANDER HAMILTON 437-44 (H. Lodge ed. 1904), with Madison's view. 6 THE WRITINGS OF JAMES MADISON 138-88 (G. Hunt ed. 1906).

The futility of discerning original intent is exemplified by the debate over the substitution of the phrase "declare War" for "make War" during the drafting of Article I.[78] The debate usually starts like this: under the Articles of Confederation, Congress had the power to declare and make war.[79] The original draft of the Constitution gave Congress the power to "make war," which was changed during the Constitutional Convention to "declare war." This is significant because "one of the chief purposes of the Convention was to separate the legislative from the executive functions."[80] The inference is that the power to declare war — that is, to mobilize the country and to alter the United States' international legal status (with its many ramifications), in itself a constitutional law issue — was of a clearly legislative character and, thus, belonged to the Congress. The power to "make war," however, was considered an executive function and, thus, belonged to the President.[81]

Another view is that the Founding Fathers themselves intended a more narrow meaning. Of late, the most often quoted[82] treatment of the debate on the War Power during the Constitutional Convention is by Judge Abraham Sofaer, now Legal Adviser to the Department of State, who observed:

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78. Changes in language between the Articles of Confederation and the Constitution may be significant. In McCulloch v. Maryland, for example, Chief Justice Marshall noted that the word "expressly" does not appear in the Tenth Amendment, although it was contained in the Articles of Confederation. "The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it, to avoid those embarrassments." 17 U.S. (4 Wheat.) 316, 406-07 (1819). *See also* Knowlton v. Moore, 178 U.S. 41, 85 (1900) (recognizing the "distinction between the Articles of Confederation and the present constitution" for purposes of discerning the meaning of words within the Constitution).

79. ARTICLES OF CONFEDERATION art. 9.

80. Myers v. United States, 272 U.S. 52, 115-16 (1926) (Taft, C.J.). The Court did not alter its reasoning on the separation of powers as it relates to this argument in Humphrey's Executor v. United States, 295 U.S. 602 (1935), and Weiner v. United States, 357 U.S. 349 (1958).

81. The traditional view is that the change from "make" to "declare" war was intended to give the President significantly greater powers. *See, e.g.*, Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187, 209 (1975). *See also* Lungren & Krotoski, *supra* note 34, at 769-772. *But see* Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972). Professor Lofgren considers the change from "make" to "declare" as an ambiguous one, and sets forth five explanations of its significance. First, America would therefore restrict itself to fully declared wars. Second, America would limit its intercourse with other nations to trade and commerce. Third, if Congress' power to declare war is strictly interpreted then the power to make *un*declared wars must be viewed as not belonging to Congress but to the President. Fourth, as used in the Constitution, "declare" was taken to mean "commence" and not the narrower international law term of art. Finally, any war-commencing power not covered by Congress' power to declare war must be considered as vested in Congress because of Congress' control of reprisals, *e.g.*, the power to grant letters of marque and reprisal. *Id.* at 694-95.

82. *See, e.g.*, A. Lakeland, *The War Powers Resolution: Necessary and Legal Remedy to Prevent Future Vietnams*, *in* CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 153, 153-54 (S. Soper ed. 1984).

> The draft Constitution assigned Congress the power to "make" war. Charles Pinckney sought on August 17 to vest the power in the Senate alone; the Senate would be familiar with foreign affairs, it already had the power to make treaties of peace, and action by both houses would take too long. Pierce Butler responded that, if informed judgment and efficiency were the relevant criteria, he was "for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Madison then "moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." Sherman apparently assumed the President already had power to repel attacks. He thought the clause "stood very well. The Executive shd. be able to repel and not to commence war. 'Make' better than 'declare' the latter narrowing the power too much."
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> Elbridge Gerry from Massachusetts, who seconded Madison's motion to substitute "declare" for "make," attacked Butler's suggestion: he "never expected to hear in a republic a motion to empower the Executive alone to declare war." Ellsworth then spoke against Pinckney's motion to give the power of war to the Senate. "[T]here is a material difference," he said, "between the cases of making war, and making peace. It shd. be more easy to get out of war, then into it. War also is a simple and overt declaration. Peace attended with intricate & secret negotiations." George Mason of Virginia also was for clogging war and facilitating peace, and therefore "was agst giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate, because not so constructed as to be entitled to it." He added that "he preferred 'declare' to 'make,' " and Rufus King concurred because " 'make' war might be understood to 'conduct' it which was an Executive function."
>
> Pinckney's suggestion that the Senate be given the power to make war was rejected overwhelmingly, but Madison's motion to change "make" for "declare" was approved. The change was intended by Madison and Gerry to enable the President to respond to "sudden attacks" without a declaration of war, and by King and others to leave the conduct of war in executive hands. They therefore appear to have intended the clause to authorize the President to defend the United States from attack without consulting the legislature, at least where the attack is so "sudden" that consultation might jeopardize the nation. But nothing in the change signifies an intent to allow the President a general authority to "make" war in the absence of a declaration; indeed, granting the exceptional power suggests that the general power over war was left in the legislative branch.[83]

Judge Sofaer suggests that the Founding Fathers intended by "make war" only to give the President power enough to repel sudden attacks, but that Congress retained the power to decide when and where force was to be used.

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83. A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 31-32 (1976) (citations omitted).

Now that is a powerful argument to draw an opposite inference. But this conclusion is historically incorrect and raises more questions than it answers. For one thing, it does not consider what the Founding Fathers meant by "war." There is a strong argument that the Founding Fathers had in mind something more akin to the international law[84] distinction[85] between "war" and "peace"[86] than to the practice of using force without declaring war,[87] such as the French intervention in the American war of

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84. "International law had unobtrusively been woven into the fabric of our national existence." Raymond & Frischholz, *Lawyers Who Established International Law in the United States, 1776-1914*, 76 AM. J. INT'L L. 802, 803 (1982).

85. "War is an aspect of a nation's international relations and must therefore be seen from the perspective of the international as well as the domestic order." Wallace, *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719, 720 (1972). This has been a recognized and well-settled proposition at least since Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 83-84 (1795). *See also* United States v. Curtiss-Wright Export Corp., 299 U.S. at 315, *et seq.*

86. As Grotius observed, "inter bellum et pacem nihil est medium" (between war and peace there is no other category). H. Grotius, *De Jure Belli ac Pacis* III, xxi, 1 (1625). Modern international law also recognizes this distinction. *See, e.g.*, L. OPPENHEIM, INTERNATIONAL LAW, Vol. 1, PEACE (H. Lauterpacht 8th ed. 1955), Vol. 2, *War* (H. Lauterpacht 7th ed. 1952) [hereinafter cited as Lauterpacht].

87. Among other things, the declaration of war alters the declarant's international legal status, empowering the declarant to take action, *i.a.*, against certain shipping, and forcing other States to declare war or neutrality — a fact the Federalists, mostly from northern trading states, were keenly aware of. Indeed, it was in Massachusetts that the first American Prize court was established. 1 J.B. SCOTT, PRIZE CASES DECIDED IN THE UNITED STATES SUPREME COURT 1789-1918 2 (1923). In the 1807 British Prize case *The Neptune*, Sir William Scott (Lord Stowell) observed that "[i]t is well known that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce." 165 Eng. Rep. 978, 979, 6 Rob. 403, 405-06 (1807). *See also* Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 535-36 (1867) (it is universally accepted that "the immediate and necessary consequence of a declaration of war is to interdict all intercourse or dealings between the subjects of the belligerent states."); The William Bagaley, 72 U.S. (5 Wall.) 377, 405 (1866) ("War necessarily interferes with the pursuits of commerce and navigation, as the belligerent parties have a right, under the law of nations, to make prize of the ships, goods, and effects of each other upon the high seas."); Jecker v. Montgomery, 59 U.S. (18 How.) 110, 112 (1855) ("The consequence of this state of hostility is, that all intercourse and communication between [belligerents] is unlawful."; The Commercen, 14 U.S. (1 Wheat.) 382, 395-407 (1816) (Marshall, C.J. concurring) (declared war between the U.S. and Britain gave the U.S. the "declared right" under international law to capture a Prize Swedish vessel where Sweden was a co-belligerent with Britain against France, a war in which the U.S. was neutral); The Nereide, 13 U.S. (9 Cranch) 388, 418 (1815) ("[W]ar gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend."); The Rapid, 12 U.S. (8 Cranch) 155 (1814) (A state of war provides states with the right to authorize capture of enemy vessels); The Julia, 12 U.S. (8 Cranch) 181, 193 (1814) ("[I]n war, all intercourse between the subjects and citizens of the belligerent countries is illegal"); The Sally, 12 U.S. (8 Cranch) 382 (1814) (Property of enemy nationals as well as citizens of U.S. trading with the enemy, captured on the high seas, is prize of war under international law); Hannay v. Eve, 7 U.S. (3 Cranch) 242, 247 (1806) (during a declared war, international law authorizes the U.S. government to allow the crew of an enemy vessel to submit their ship and collect the Prize). *See generally* The Paquette Habana, 175 U.S. 677 (1900); 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 791-913 (1968); 7 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 1-341; A.

independence, or limiting the Executive from using armed force short of war in pursuit of the then-recognized international law rights of self-help or reprisal.[88] It was perhaps in this sense that Oliver Ellsworth observed during the constitutional debate that "[w]ar . . . is a simple and overt declaration."[89] Similarly, when Elbridge Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war," he contemplated a *declaration*, not the tactical use of force.[90] It

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VERZIJL, LE DROIT DES PRISES DE LA GRANDE GUERRE (1924); 7 J.B. MOORE, *supra* note 60, at 342-858.

A preliminary exercise to the taking of Prize is the right of visit and search. *The Nereide*, 13 U.S. (9 Cranch) at 427-28; G. HACKWORTH, *supra*, at 175-76. The Supreme Court noted that "[t]he right of visitation and search [is] strictly a belligerent right." The Antelope, 23 U.S. (10 Wheat.) 66, 119 (1825) (Marshall, C.J.). "[T]he right of visitation and search . . . is strictly a belligerent right, allowed by the general consent of nations, in time of war, and limited to those occasions." The Marianna Flora, 24 U.S. (11 Wheat.) 1, 42 (1826) (Story, J.). In The Louis, 2 Dods. 210, 165 E.R. 1464 (1817), the High Court of Admiralty observed that

> [t]his right, incommodious as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defense, in preventing the enemy from being supplied with the instruments of war, and from having its means of annoyance augmented by the advantages of maritime commerce.

2 Dods. at 238, *Id.* at 1475. *Accord* The Young Jacob and Johanna, 1 Rob. 20, 165 E.R. 81 (1798); The Maria, 1 Rob. 340, 165 E.R. 199 (1799).

Because of this, the War Power was linked to the Commerce Power, which is specifically assigned to the Congress. U.S. CONST. art. I, § 8, cl. 3. One highly respected scholar has observed that "[n]eutral merchants had very profitable possibilities connected with the carrying trade of belligerents, while merchants operating as privateers, or others exercising belligerent rights had quite different opportunities which called for a careful readjustment of mercantile rights." A.P. Rubin, *Foreign Policy by Congress: Book Review*, 4 FLETCHER FOR. 283, 284 (1980). *See also* L. ATHERLEY-JONES, COMMERCE IN WAR (1907); F. UPTON, THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR 16-36, *et seq.* (3d ed. 1863). It was, perhaps, in this vein that President Washington urged in his Farewell Address that "[t]he great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little political connection as possible." G. Washington, *Farewell Address*, *reprinted in* BASIC DOCUMENTS IN AMERICAN HISTORY 70, 77 (R. Morris ed. 1965). The linkage of "war, peace and commerce" is also made in *The Federalist* No. 64 (J. Jay), *supra* note 42, at 325.

88. *See, e.g.*, A. HINDMARSH, FORCE IN PEACE: FORCE SHORT OF WAR IN INTERNATIONAL RELATIONS 85, *passim* (1933, reprinted in 1973). The eminent international law scholar Judge Sir Hersch Lauterpacht observed that self-help and reprisal "are not necessarily acts initiating war." 2 Lauterpacht, *supra* note 86, at 203.

89. *Quoted in* A. SOFAER, *supra* note 83.

90. John Bassett Moore noted that:

> Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though not force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another . . . and yet no state of war may arise. . . .The distinction is of the first importance, since, from the moment when a state of war supervenes third parties become subject to the performance of the duties of neutrality as well as to all the inconveniences that result from the

should be recalled that it was Gerry who, in June 1775, proposed the establishment of the first American Prize court,[91] while Ellsworth had served as an appeals judge in the Prize case of *The Active*,[92] illustrating their understanding of and concern for the international law of war.[93] Finally, Rufus King appears to say that he agreed that Congress' power should be restricted to a declaration of war because making war "was an Executive function." This distinction (between making war and declaring war) was recognized in *Bas v. Tingy*[94] and *Montoya v. United States*.[95] In both cases the Supreme Court found that a *declaration* of war was a profound legal act by the Congress,[96] as opposed to the use of force in armed conflict.[97]

The Founding Fathers surely were concerned with the effects of a *declaration* of war on commerce.[98] Professor Alfred P. Rubin noted that

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exercise of belligerent rights.
7 J.B. Moore, *supra* note 60, at 153-54.

91. 1 J.B. SCOTT, *supra* note 87, at 2. In November 1775, General Washington urgently requested the Continental Congress to set up a system of national Prize courts. "Washington to the President of Congress, Nov. 8 and 11, 1775," *in* 4 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799 73, 81-82 (J. Fitzpatrick ed. 1931-1944). On Nov. 25, 1775, Congress responded by establishing for a trial period Prize courts. 3 JOURNALS OF THE CONTINENTAL CONGRESS 371-75 (W. Ford ed. 1904-1937).

92. Bourguignon, *Incorporation of the Law of Nations During the American Revolution — The Case of the San Antonio*, 71 AM. J. INT'L L. 270, 295 (1977).

93. *Id.* On some legal effects of war, see, *e.g.*, W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 952-54 (3d ed. 1971).

94. 4 U.S. (4 Dall.) 37 (1800).

95. 180 U.S. 261 (1901).

96. "We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail." Ex parte Milligan, 71 U.S. (4 Wall.) 2, 140 (1866) (concurring opinion of Chase, C.J., and Wayne, Swayne and Miller, J.J.).

97. Hague Convention III of 1907, 36 Stat. 2259, 2271 (1967) provides in article I that: "The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." This statement may have been more a reflection of prior rather than contemporary practice. *See, e.g.*, Moore, who noted: "It is universally admitted that a formal declaration is not necessary to constitute a state of war." 7 J.B. MOORE, *supra* note 60, at 171. Nevertheless, the practice continued. *See* the British ultimatum to Germany initiating hostilities in the Second World War.

98. In *The Rapid*, the Supreme Court noted that, upon a declaration of war

> a new state of things has occurred — a new character has been assumed by this nation, which involves it in new relations, and confers on it new rights . . .. The nature and consequences of a state of war must direct us to the conclusions which we are to form in this case . . .. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy — because the enemy of his country . . .. The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it.

12 U.S. (8 Cranch) at 160-62.

> the fact that the Constitution entrusted to Congress the power to declare war in the same clause as the power to grant letters of marque and reprisal makes it overwhelmingly clear to those familiar with classical legal distinctions that the war-declaring power was connected with the status of merchants.[99]

Perhaps the best evidence of this distinction is the Supreme Court's opinion in *Bas v. Tingy*.[100] The case grew out of a dispute involving the prize owed in the recapture of the *Eliza* during the "undeclared war" with France between 1798-1800. A unanimous Court observed that the United States could wage hostilities without a declaration of war, because the declaration of war was a distinct constitutional act affecting commerce and relations with other States.[101] The Court thus recognized that the country could wage armed conflict [102] absent a declared war.[103]

In *The Aurora*, Pinkney argued that "[t]he rule, that trade with the enemy is illegal, results necessarily from the declaration of war, and is included in it: there was no necessity for any subsequent law to enforce the rule." 12 U.S. (8 Cranch) 203, 213 (1814). He went on to argue that "this principle was decided to be correct as early as 1704 and 1707; and it is presumed, that those decisions were founded upon former cases." *Id.* at 213-14. Lauterpacht found the origins of this rule in the 15th century. 2 Lauterpacht, *supra* note 86, at 261. Moreover, it was "settled doctrine" that the declaration of war extinguished commercial relations between citizens of belligerent States. "The doctrine is not at this day to be questioned, that during a state of hostility, the citizens of the hostile states are incapable of contracting with each other." Scholefield v. Eichelberger, 32 U.S. (7 Pet.) 586, 593 (1833). *Accord* Brown v. United States, 12 U.S. (8 Cranch) 110, 126 (1833) (Declaration of war authorizes Congress under international law, to enact legislation to seize enemy property within the territorial U.S.); Jecker v. Montgomery, 59 U.S. (18 How.) at 112. (During a state of war, "all intercourse and communication" between the belligerents' citizens is prohibited by "the law of nations"); The William Bagaley, 72 U.S. (5 Wall.) at 405. ("Public war, duly declared or recognized as such by the war-making power, imports a prohibition by the sovereign to the subjects or citizens of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country."); Hanger v. Abbott, 73 U.S. (6 Wall.) at 535 (1867). (It is a universal principle of international law that when war is "duly declared or recognized" all commercial transactions are extinguished); Coppell v. Hall, 74 U.S. (7 Wall.) 542, 557 (1868). (Under international law, contracts made during war are "utterly void").

99. A.P. Rubin, *supra* note 87, at 283-84. This point is completely missed by Judge Sofaer, who interpreted the clause on letters of marque and reprisal, U.S. CONST. art. I, § 8, cl. 11, as granting to Congress the constitutional basis for directing the use of armed force short of war, a proposition which finds no support in the classic legal literature. A. SOFAER, *supra* note 83, at 32. While letters of marque and reprisal could be issued in peacetime, as was done in the "undeclared war" with France in 1793, it would nevertheless be a *causus belli* under international law and, therefore, a means to trigger a declaration of war.

100. 4 U.S. 37.

101. 4 U.S. at 40. *See* Talbot v. Seemans, 5 U.S. (1 Cranch) 1, 18-20 (1801) (The U.S. and France were in "partial war"). This case is discussed *infra* at note 197.

102. Professor Franck has noted that "[s]ince the decision of the Supreme Court in Bas v. Tingy in 1800 and in the Prize cases in 1862, and up to and including the Vietnam cases of 1971 to 1973, the courts have refused to sustain the proposition that the use of force by the President is unconstitutional except after a formal declaration of war by the Congress." T. FRANCK, CONSTITUTIONAL PRACTICE UNTIL VIETNAM: CONGRESS, THE PRESIDENT AND FOREIGN POLICY 16 (1984).

103. But even this persuasive distinction is blurred by the ambiguous use of "war" at

This distinction was also drawn by Daniel Webster, who noted that:

> This act [of May 28, 1798], it is true, authorized the use of force, under certain circumstances, and for certain objects, against French vessels. But there may be acts of authorized force; there may be assaults; there may be battles; there may be captures of ships and imprisonment of persons, and yet no general war. Cases of this kind may occur under . . . the laws and usages of nations, and which all the writers distinguish from general war.[104]

Professor Rubin concluded that

> the Constitution contains two distinct legal [war] powers. The power to order troops into action, bringing the law of war into play with regard to that action but not with regard to uninvolved merchants, belongs to the President. The power to change general relations between the United States and any other country from the regime of the international law of peace to the regime of the international law of war belongs to the Congress. There is no reason legally or historically to view either of those powers as a limit on the other, and the refusal of the President to order forces into battle regardless of a Constitutional declaration of war, like the refusal of the Congress to declare war regardless of a Presidential order of military action, illustrates the political tensions built into the Constitution for sound legal and political reasons.[105]

The Framers appear to have regarded the *declaration* of war as distinct from the use of armed force, such as the numerous Indian "wars" and the two Barbary "wars," and even the French intervention in the U.S. war of independence.

It is impossible to state with certainty, however, the intent of the Founding Fathers. As Justice Jackson noted in the *Steel Seizure Case,*

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the time of the Constitutional Convention. "War," at that time, usually was perceived in its international legal sense, which could not have escaped notice by the Founding Fathers. On the other hand, "war" was sometimes used colloquially to mean "combat." This ambiguity was reflected in the Articles of Confederation, which provided that "[t]he United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . .," and that "[t]he United States . . . shall never engage in a war . . . in time of peace . . . ." Art. 9, paras. 1 & 6. This ambiguity led at least one author to equate, erroneously, the power to "declare war" with the power "to authorize the international use of force." Note, *The Future of the War Powers Resolution,* 36 STAN. L. REV. 1407, 1417 (1984).

104. Speech on French Spoilations, 4 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 164 (1903). Webster went on to note that

> On the same day in which this act passed, . . . Congress passed another act, entitled 'An act authorizing the President of the United States to raise a provisional army; and the first section declared, that the President should be authorized, 'in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion,' to cause to be enlisted ten thousand men.

Id. at 164-65.

105. A.P. Rubin, "The President and the Congress at War — Part I" (unpublished paper 1984).

the "partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question."[106] In fact, it is quite likely the Founding Fathers disagreed among themselves on the nature of the War Power, preferring for the sake of political expediency to leave the issue unresolved and to let future generations grapple with the question.[107] It should come as no surprise that John Quincy Adams observed that "[t]he respective powers of the President and Congress of the United States, in the case of war with foreign powers are yet undetermined. Perhaps they can never be determined."[108]

One of the few things that is clear is that advocates can muster authority for just about any interpretation of original intent on the War Power. Therefore, perhaps the more reliable path to an understanding of the War Power is to analyze the structure of the Constitution itself to

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106. Youngstown Sheet & Tube Co., 343 U.S. at 634-35 (Jackson, J., concurring).

107. Another view is that much of the "foreign affairs power" is not mentioned in the Constitution because the Founding Fathers assumed the new government had the powers any State may possess under international law. Justice Story observed that powers in the Constitution flow not only from the aggregate of enumerated powers but also "from the aggregate powers of the national government." For instance, Story argued, since the Constitution omits reference to extending jurisdiction over conquered territory, one must look to the nature of government (and *not* Amendment X) for this power. "This would perhaps rather be a result from the whole mass of the powers of the national government, and from the nature of political society, than a consequence or incident of the powers specially enumerated." 2 J. STORY, *supra* note 40, at 148. *See also* Jones v. United States, 137 U.S. 202, 212 (1890). *Cf.* Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936). In *The Chinese Exclusion Cases*, the Court noted that Congress possessed jurisdiction over and could, therefore, exclude aliens (even though there is no specific constitutional authority) since

> [j]urisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. . . . [T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.

130 U.S. 581, 603-04 (1889). *See also* Burnett v. Brooks, 288 U.S. 378, 396 (1933); MacKenzie v. Hare, 239 U.S. 299, 311 (1915).

Perhaps the most radical exposition of this thesis was by Mr. Justice Sutherland in United States v. Curtiss-Wright Export Corp., where it was stated that

> the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and . . . found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

299 U.S. at 364 (citations omitted).

108. J.Q. ADAMS, EULOGY ON MADISON 47 (1836).

determine, from an architectural perspective, where the power should resides.

4. The Separation of Institutions and Powers

John Roche observed that ours is a government of separated institutions sharing powers.[109] The Supreme Court has noted that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers; it was woven into the document that they drafted in Philadelphia in the summer of 1787."[110] "This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands."[111] In this regard, the Framers of our Constitution were profoundly influenced by Montesquieu,[112] whose injunction against the concentration of political power in any single branch of government was reflected in the Constitution's balance of powers.[113] Montesquieu observed:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary con-

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109. *See also* Kilbourn v. Thompson, 103 U.S. 168, 190 (1880); Kendall v. United States, 37 U.S. (12 Peters) 524, 610 (1838). The doctrine of the separation of powers is nowhere stated in our Constitution; rather, it is "a conclusion logically following from the separation of the several departments." Springer v. Government Philippine Islands, 277 U.S. 189, 201 (1928). *Accord* Myers v. United States, 272 U.S. at 89.

110. Buckley v. Valeo, 424 U.S. at 124. The separation of powers "is at the heart of our Constitution . . .." *Id.* at 119. *Accord Chadha*, 462 U.S. at 951-52, 962; Springer v. Government Phillippine Islands, 277 U.S. at 201. *Cf.* Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367, 390 (1977) ("It is doubtful that the concept of separation of powers can really have any objective meaning.").

111. O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

112. Madison observed that "[t]he oracle who is always consulted and cited on this subject is the celebrated Montesquieu." *The Federalist* No. 47 (J. Madison), *supra* note 42, at 244. Although Montesquieu profoundly influenced the Framers, his injunctions were more in the nature of philosophical views than a blueprint of English government. Professor Fisher quotes Justice Holmes as saying that Montesquieu's "England — the England of the threefold division of power into legislative, executive and judicial — was a fiction invented by him . . .." L. FISHER, *supra* note 44, at 248. Indeed, Fisher argued that

> [o]ur structure of government owes its existence to the experiences of the framers, not the theory of Montesquieu or precedents borrowed from England. The framers used Montesquieu selectively, adopting what they knew from their own experience to be useful and rejecting what they knew to be inapplicable. The product was more theirs than his.

L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 10 (1985).

113. Montesquieu's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a "security for the people" and had the "full approval" of the Framers. Myers v. United States, 272 U.S. at 116.

> troul; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[114]

In *The Federalist* No. 47, Madison found that when Montesquieu said that governmental powers should be separated, he (Montesquieu) did not mean isolated or fully independent.

> [H]e did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other. His meaning . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted. [115]

The Framers were rather pragmatic and motivated by a belief that political powers should not be divided completely among institutions, only that institutions should be independent of one another.[116] Thus, said Madison, the three branches of Government "ought to be kept as separate from, and independent of each other as the nature of free government will admit; or as is consistent with the chain of connection, that binds the whole fabric of the constitution in one indissoluble bond of unity and amity."[117]

The powers of government, however, were to be shared, so that each branch would have a check upon the other. "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."[118] Madison argued in *The Federalist* No. 48 that the political powers of each department should not "be wholly unconnected with each other"

> unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained.

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114. *Quoted in* CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 649 (4th ed. P. Freund, A. Sutherland, M. Howe, E. Brown, eds. 1977).

115. *The Federalist* No. 47 (J. Madison), *supra* note 42, at 245 (emphasis deleted).

116. This concept is often misunderstood. *See, e.g.*, Vance, *Striking The Balance: Congress And The President Under The War Powers Resolution*, 133 U. PA. L. REV. 79, 84 (1984) (arguing that the war power does "not fit neatly into the classic concept of the separation of . . . powers. Instead, the area is one of shared and overlapping responsibilities . . .").

117. *The Federalist* No. 47 (J. Madison), *supra* note 42, at 246, *quoting with approval* the New Hampshire Constitution (emphasis deleted).

The Supreme Court observed in Buckley v. Valeo, 424 U.S. at 120, that there is "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another."

118. Bowsher v. Synar, — U.S. —, 106 S.Ct. 3181, 92 L. Ed. 2d 583 (1986) (Striking down the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985).

> It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved.[119]

Perhaps the quintessential example of this sharing of powers is the War Power, which is divided between the political branches.[120] One can discern the constitutional repository for the power to decide to deploy U.S. armed forces into hostilities or imminent hostilities from an examination of the theory and practice of the separation of powers or, put another way, "by their nature, and by the principles of our institutions."[121]

There are two paths to find the constitutional resting place of this power. The first is the "more like" line of inquiry: Is the power to decide to deploy U.S. armed forces into hostilities or imminent hostilities more like the power to raise and support the army, or is it more like the power to command the forces once deployed? This is a theoretical inquiry involving an analysis of specifically enumerated war-related powers. The

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119. *The Federalist* No. 48 (J. Madison), *supra* note 42, at 250.

120. ROSTOW, *supra* note 61, at 847. *See also* E. KEYNES, UNDECLARED WAR (1982); A. SOFAER, *supra* note 83, at 1-60. In Atlee v. Laird, 347 F. Supp. 689, 705 (E.D. Pa. 1972), *aff'd mem.* 411 U.S. 911 (1973), the district court noted that "the courts that have considered the war-making power of the United States have all agreed that such power is shared by the executive and legislature to the exclusion of the courts." *See also* Mitchell v. Laird, 488 F. 2d 611, 613-14 (D.C. Cir. 1973); Massachusetts v. Laird , 451 F. 2d 26, 32 (1st Cir. 1971); Berk v. Laird, 429 F. 2d 302, 305 (2nd Cir. 1970), *aff'd sub nom.*, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971), Drinan v. Nixon, 364 F. Supp. 854, 859 (D. Mass. 1973).

The conduct of foreign relations generally is reserved to the political branches. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments." Oetjen v. Central Leather Co., 246 U.S. 297, 3.2 (1918). *See also* Chicago & Southern Airlines v. Waterman Steamship Co., 333 U.S. 103, 111 (1948). U.S. v. First National Bank, 396 F.2d 897, 901 (2nd Cir. 1968). This does not mean that "every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186, 211 (1962). It is clear that

> [t]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts . . .. We cannot shirk this responsibility merely because our decision may have significant political overtones.

Japan Whaling Association v. American Cetacean Society -—U.S. -—, 54 U.S.L.W. 4929, 4931 (June 30, 1986).

121. Ex parte Milligan 71 U.S. (4. Wall.) at 139 (concurring opinion of Chase, C.J., and Wayne, Swayne and Miller, JJ.)

other line of inquiry is to look for constitutional analogies to determine where this power most properly resides. This will be done by an examination of cases involving the separation of powers.

a. *Constitutional division of war-related powers.*

As noted previously, the Constitution specifically assigns certain powers to Congress and others to the President.[122]

> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of the Congress, nor Congress upon the proper authority of the President. Both are servants of the people whose will is expressed in the fundamental law.[123]

i. *The Congress*

Congress' powers include the raising of armed forces,[124] appropriating funds to support them,[125] prescribing rules to regulate their conduct[126] and, most importantly, the power to declare war.[127] Moreover, the Senate must approve Presidential nominees for promotion in the armed services.[128]

The War Powers Resolution appears to be founded upon only one of Congress' powers: the power to declare war. It is clear, or at least well settled by custom and usage, that the Congress' power is not wider, since the President may send U.S. armed forces anywhere in the world, at any time he pleases,[129] subject only to restrictions in the law,[130] including (arguably) the War Powers Resolution. The theory underlying the War Powers Resolution is that the use of force *may* catapult the United States into a war, depriving the Congress of its power to decide whether or not

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122. Moreover, a fundamental constitutional distinction exists between powers exercised in domestic and foreign affairs. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304.

123. Ex parte Milligan, 71 U.S. (4 Wall.) at 139 (concurring opinion of Chase, C.J., and Wayne , Swayne and Miller, JJ.). In his veto message of the War Powers Resolution, President Nixon stated: "The authorization and appropriations process represent one of the ways in which such influence can be excercised." "Veto of War Powers Resolution," *supra* note 2. *See also* Glennon, *Strengthening the War Powers Resolution: The Case for Purse-String Restrictions*, 60 MINN. L. REV. 1, 28-38 (1975). *But see* the possible constitutional conflict raised in note and text accompanying note 200 and as a possible limitation upon this power.

124. U.S. CONST. art. I, § 8, cls. 12 & 13.

125. U.S. CONST. art. I, § 8, cls. 12 & 13.

126. U.S. CONST. art. I, § 8, cl. 14.

127. U.S. CONST. art. I, § 8, cl. 11.

128. U.S. CONST. art. II, § 2, para. 2.

129. *See supra* note 114.

130. Such as prohibitions to spend funds for combat forces in a certain place. *See, e.g.*, Act of July 1, 1973, *supra* note 14.

to declare war.[131] Thus, the President's use of force may on this ground be restrained. This reasoning is historically and constitutionally flawed.[132]

At least since the outset of the 20th century, this country has run little or no risk of becoming embroiled in a declared war because of the use of American troops without congressional approval. In the two largest military actions short of war, Korea and Vietnam,[133] the Congress willingly and continuously exercised its power in support of the use of troops in combat by raising armed forces through conscription and supporting them with ongoing appropriations. In the numerous minor incidents in which the President has ordered troops into hostilities, such as the Dominican Republic in 1965-1966 and Grenada in 1983, there was little risk of declared war.

ii. *The President*

The President's powers flow from his broad mandate; he is: vested with the "executive power,"[134] Commander in Chief[135] and the sole organ

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131. Professor Henkin offers an alternative and interesting theory. He sees the policy aspect of the use of force as a source for Congressional war powers. *See* Henkin, *'A More Effective System' For Foreign Relations: The Constitutional Framework*, 61 VA. L. REV. 751, 764 (1975).

132. This reasoning also ignores the fact that in the conduct of contemporary diplomacy, a wide variety of factors not involving the use of U.S. military forces might lead to war, such as food embargoes, economic sanctions, economic assistance to a State involved in an armed conflict and so forth. For instance, it is widely believed that the Japanese attack on Pearl Harbor which triggered the U.S.' entry into the Second World War, was caused in part by U.S. economic policies towards Imperial Japan. *See generally* B.H. LIDDELL HART, HISTORY OF THE SECOND WORLD WAR 199 (1970); G. PRANGE, AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR (1981). Surely, the Congress may not control or interfere with the President in these areas pursuant to its power to declare war; therefore, Congress' War Power has limits. Based upon the writings of the Founding Fathers, international law at the time and Revolutionary War-era Prize cases, there is little reason to doubt that the phrase "*declare war*" meant anything other than what it says.

133. Professor Henkin observed that

> [o]f the numerous recent 'uses' of force, only Korea and Vietnam would have been clearly covered [by the War Powers Resolution]. Had such legislation been in effect, President Truman would perhaps have acted anyhow, but might have been impelled to seek Congressional approval within thirty days. Vietnam was expressly authorized, and, presumably, any Tonkin Resolution would have clearly authorized hostilities beyond thirty days as well.

L. HENKIN, *supra* note 55, at 103.

134. U.S. CONST. art. II, § 1. "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . .." Myers v. United States, 272 U.S. at 118.

135. *See infra* text accompanying notes 139-149.

Alexander Hamilton distinguished between the broad language of article II, § 1 and the specific grants in article I, § 1. "All legislative Powers *herein granted* shall be vested in a Congress of the United States." 7 WORKS OF ALEXANDER HAMILTON 76 (H.C. Lodge ed. 1851). Hamilton concluded that "[t]he [article II] enumeration [in §§ 2 & 3] ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, inter-

for the conduct of foreign relations.[136] These are amorphous but extremely potent powers, which led the Supreme Court to observe that "[t]he difference between the grant of legislative power under article I to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article II is significant."[137]

A President may act upon the sum of his powers, while congressional action requires a specific constitutional provision, sweeping though it may be (consider the commerce power, for instance). Thus, a theoretical analysis may be reduced to a single question: Does the power to decide to deploy U.S. armed forces into areas of hostilities or imminent hostilities flow to Congress from one of its specific powers, or to the President under his broad mandate of executive powers?

(A) Commander in Chief Power

It has been stated repeatedly, and wrongly, in my view, that the font of the President's War Power is his constitutional appointment as Commander in Chief.[138] One former Chief Executive and Chief Justice of the Supreme Court observed that "[t]he President is the Commander-in-Chief of the army and navy, and the militia when called into the service of the United States. Under this, he can order the army and navy anywhere he will, if the appropriations furnish the means of transportation."[139] This is probably not the power upon which the President properly may ground a decision to decide to deploy U.S. armed forces into a new armed conflict, although it is the power to wage war effectively.[140] It is, therefore, a very potent power. For example, it was in the exercise of this power that Franklin Roosevelt agreed with Winston Churchill during

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preted in conformity with other parts of the constitution." *Id.* at 80-81.

136. *See supra* note 74.

137. Myers v. United States, 272 U.S. at 128.

138. In his concurring opinion in the *Steel Seizure Case*, Justice Jackson observed that the Commander in Chief power implies "something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by non assertion yet cannot say where it begins or ends." 343 U.S. at 641.

139. W. TAFT, THE PRESIDENT AND HIS POWERS 94-95 (1916). During the debate surrounding the Congressional approval of the Act of March 3, 1909, 35 Stat. 773-74, requiring the President to maintain a complement of marines on Navy capital ships and cruisers of not less than 8 percent of the enlisted strength, Senator Borah stated:

> Congress has not the power to say that an army shall be at a particular place at a particular time or shall manouver in a particular instance. That belongs exclusively to the Commander in Chief of the Army. The dividing line is between the question of raising, supporting and regulating an army, and commanding it. It is difficult to define, for the reason that it is difficult to tell where the dividing line is. But when it is ascertained, there is no question about the constitutional provision covering it.

43 CONG. REC. 2452 (1909).

140. T. EAGLETON, WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER 113 (1974); Wallace, *supra* note 85, at 744-52 *et seq.*

the Casablanca Conference in January 1943 that their countries would demand the "unconditional surrender" of the three Axis powers;[141] a decision of profound significance for the war effort. Similarly, President Lincoln based the emancipation proclamation upon the Commander in Chief power, claiming it was justified by military necessity.[142] Further, President Truman based his decision to drop the atomic bomb on Japan but not to use it in the Korean conflict upon the Commander in Chief power.

The Commander in Chief delegation was intended to insure civilian control of the military[143] and, once hostilities existed, to vest the power to wage the struggle in the President.[144] In one of the most often quoted

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141. For an interesting and well researched account of this momentous decision , see 7 M. GILBERT, WINSTON S. CHURCHILL: THE ROAD TO VICTORY, 1941-1945 309 (1986); H. FEIS, CHURCHILL, ROOSEVELT, STALIN: THE WAR THEY WAGED AND THE PEACE THEY SOUGHT 108-11 (2d ed. 1967). Roosevelt stated:

> Peace can come to the world only by the total elimination of German and Japanese war power. . . . The elimination of German, Japanese, and Italian war power means the unconditional surrender by Germany, Italy, and Japan. That means a reasonable assurance of future world peace. It does not mean the destruction of the population of Germany, Italy, or Japan, but it does mean the destruction of the philosophies in those countries which are based on conquest and the subjugation of other people.

Quoted in id. at 109.

142. *See supra* note 143.

143. 10 Op. Att'y Gen. 74, 79 (1861). *See also* L. HENKIN, *supra* note 55, at 50; A. SCHLESINGER, *supra* note 55, at 6. "By making the Commander in Chief a civilian who would be subject to recall after four years, the Founders doubtless hoped to spare America tribulations of the sort that the unfettered command and consequent political power of a Duke of Marlborough had brought to England." *Id.*

The Commander in Chief power may and, in fact, has crossed the threshold and become a substantive power. Perhaps the best example of this is when President Abraham Lincoln used this power as his constitutional authority for the Emancipation Proclamation. Lincoln claimed this was a necessary military measure to shorten the Civil War. W. WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 66 (10th ed. 1864, *reprinted in* 1971). *See also* G. MILTON, THE USE OF PRESIDENTIAL POWER 1789-1943 118 (1965). Whether or not the Emancipation Proclamation was needed for military reasons, it certainly aided Lincoln politically in the northern states. Of all the Presidents, Lincoln made the widest and most frequent use of this power. *Id.* at 316.

144. The Founding Fathers wanted to assure that control of military activities was not vested in the Congress because of the experience of war by committee during the war of independence. It was in this vein that Hamilton wrote that "[ ]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the excercise of power by a single hand." *The Federalist* No. 74 (A. Hamilton), *supra* note 42, at 376.

It has been observed that:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interfere with the command of the forces and the conduct of campaigns. That power and duty belongs to the President as commander-in-chief.*

Ex parte Milligan, 71 U.S. (4 Wall.) at 139 (Chase, C.J., and Wayne, Swayne, and Miller, JJ., concurring) (emphasis added). In Swaim v. United States, 28 Ct. Cl. 173, 221 (1893),

passages of *The Federalist*, Alexander Hamilton opined that the power of the Commander in Chief "amount[ed] to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral. . .."[145] Although the Commander in Chief power is broad and involves policy-making when war (and, perhaps, even high intensity armed conflict) exists,[146] this power was neither intended to nor does it authorize the President to make the policy decision to involve U.S. armed forces in combat, with the exception of areas such as self-defense and preemptive strikes.[147] Justice Jackson, in his concurring opinion in the *Steel Seizure Case*, rejected the notion that it vests the President with the "power to do anything, anywhere, that can be done with an army or navy."[148] Chief Justice Stone observed in the *Nazi Saboteurs Case* that the Constitution "invests the President as Commander in Chief with power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces."[149] In *United States v. Sweeny*,[150] the Supreme Court observed that the Commander in Chief power "is evidently to vest in the President the supreme command over all the military forces, — such supreme and undivided command as would be necessary to the prosecution of a successful war."[151] Surely we would not claim that the joint chiefs of staff have the constitutional authority to decide, as a matter of national political policy, that armed force as opposed to negotiation should be employed in a given situation. How, then, can it be that the "first General and Admiral" is to be treated differently? The Commander in Chief power gives the President the authority to deploy armed forces, but not *to decide* to deploy them.

(B) Foreign Policy Power

The decision to use American troops, in situations short of war, is clearly related to the conduct of U.S. foreign policy—an executive, rather than a legislative, function.[152] The President[153] is responsible for sending

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aff'd, 165 U.S. 553 (1897), the Court of Claims noted that "Congress may increase the Army, or reduce the Army, or abolish it altogether . . . but so long as we have a military force Congress can not take away from the President the supreme command."

145. *The Federalist* No. 69 (A. Hamilton), *supra* note 42, at 350. *See also* Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). (The Commander in Chief power did not "extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.")

146. This includes certain powers affecting citizens within the United States. *See* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984 231, 242 *et seq.* (5th rev. ed. 1984). *Cf.* Youngstown Sheet & Tube Co., *supra*.

147. *See* L. HENKIN, *supra* note 55, at 53. *But see* Rehnquist, *The Constitutional Issues — Administration Position*, 45 N.Y.U.L. REV. 628, 631-32 (1970).

148. 343 U.S. at 641-42 (Jackson, J., concurring).

149. Ex parte Quirin, 317 U.S. 1, 26 (1942).

150. 157 U.S. 281 (1895).

151. 157 U.S. at 284.

152. The State Department took the position at one point that the President's use of

and recalling ambassadors, opening and closing embassies, formulating and coordinating geopolitical strategy, negotiating trade agreements, entering into executive agreements, presenting and prosecuting international claims, and a host of other international activities inherent in the foreign policy power. There is no question that the projection of military power is a means of conducting foreign policy.[154] Diplomacy and the use of force "are complementary aspects to the . . . art of conducting relations with other states."[155] Thus, "foreign policy and war are on a continuum."[156] Consider, for example, the "Carter Doctrine." In his State of the Union address on January 23, 1980, President Carter proclaimed: "An attempt by an outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States. It will be repelled by use of any means necessary, including military force."[157] Similarly, in his State of the Union address on December 2, 1823, fearing the reconquest of Spanish America by the Holy Alliance in favor of the Bourbons, President James Monroe declared that the United States "should consider any attempt . . . to extend [foreign intervention] to any portion of this hemisphere as dangerous to our peace and safety."[158] This became known as the Monroe Doctrine.[159] President

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force in foreign policy is outside the Congress' direct power to control.

> Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that his authority may not be interfered with by the Congress in the excercise of powers which it has under the Constitution.

Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Comm. on Foreign Relations and Armed Services, 82d Cong., 1st Sess. 92-93 (1951) (statement of Secretary of State Dean Acheson), *reprinted in* THE POWERS OF THE PRESIDENT AS COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES 66, 71 (D. Schaffer & D. Mathews eds. 1974). The implication of this testimony is that the constitutional restraints on the use of force in the conduct of foreign policy are the same as those which apply to the normal conduct of diplomacy.

153. In foreign policy making, Americans tend to adopt an anthropomorphic view. Of course, the President does not single-handedly make foreign policy decisions; rather, there are any number of departments of the U.S. Government which daily contribute to the foreign policy process. For instance, there are 26 federal government agencies, departments and offices which regularly participate in international trade policy making.

154. Clausewitz observed that the use of force is yet another means of conducting politics. K. CLAUSEWITZ, ON WAR 101 (1968).

155. R. ARON, PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS 24 (1966).

156. Wallace, *supra* note 85, at 733.

157. "Transcript of President's State of the Union Address to Joint Session of Congress," *N.Y. Times*, Jan. 24, 1980, at A 12, col. 3.

158. The Monroe Doctrine, *reprinted in* R. MORRIS, *supra* note 87, at 99.

159. In his State of the Union address on December 2, 1845, President James Polk reasserted the Monroe Doctrine, expanding it to prohibit diplomatic intervention by outside powers in the New World. He concluded that "[t]he people of the United States can not, therefore, view with indifference attempts of European powers to interfere with the independent action of any nation on this continent." Admittedly, the Monroe Doctrine was transformed from a defensive measure to a justification for intervention by President Theodore Roosevelt in his State of the Union address on December 6, 1904, in what later became known as the Roosevelt Corollary to the Monroe Doctrine, during the heyday of American

Woodrow Wilson issued the Fourteen Points in a declaration that had profound consequences for American foreign policy.[160] Historian Arthur Schlesinger noted that "[t]he Fourteen Points were of critical significance to the war and peace, but this was entirely a presidential initiative, without congressional consultation or clearance."[161] Other notable instances where Presidents have set American foreign policy which implicated the use of force include: the stationing of combat troops in Iceland in July 1941, the Atlantic Charter of August 14, 1941, and the Truman Doctrine of March 2, 1947, from which sprang the policy of containment. On October 23, 1962, President John F. Kennedy issued the Proclamation of a Quarantine of Offensive Weapons to Cuba during the Cuban Missile Crisis.[162] President Kennedy ordered the U.S. Navy to blockade the shipment of offensive weapons to Cuba, using force if necessary, and unquestionably bringing this country to the brink of war.

Moreover, is there any doubt that the decision whether or not to recognize another country, to establish an embassy and to exchange ambassadors, is an executive function? Could the Congress order the President to recognize a country? Could the Congress block the President's recognition of a country? The Supreme Court answered these questions with a resounding "no" in *United States v. Pink*[163] and *United States v. Belmont*,[164] holding that as the "sole organ of the federal government in the field of international relations,"[165] these powers, either explicitly or implicitly, belong to the President. In fact, one proponent of the War Powers Resolution conceded that "the President undoubtedly possesses an exclusive power to initiate a military commitment, power that Congress may not negate or otherwise control."[166]

Perhaps the zenith of Congress' foray into the field of foreign relations was in the inter-war period, 1919-1939, when isolationists blocked the U.S.' adherence to the Versailles Treaty, entry into the League of Nations, rejection of American participation in the Permanent Court of International Justice and a host of other activities. History has revealed the failure of these policies and the Congress' role in their formulation.

(C) Executive Power

Even within the foreign affairs context, the President is vested with perhaps the broadest of all delegations of authority—the Executive power. It is axiomatic that the Constitution was created to supersede the

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gunboat diplomacy.

160. The Fourteen Points, *in* R. MORRIS, supra note 87, at 153.

161. A. SCHLESINGER, *supra* note 55, at 93.

162. "Interdiction of the Delivery of Offensive Weapons to Cuba," Proclamation No. 3504, 27 Fed. Reg. 10,401, *reprinted in* 47 Dep't State Bull. 717 (1962).

163. United States v. Pink, 315 U.S. 203.

164. United States v. Belmont, 301 U.S. 324.

165. United States v. Curtiss-Wright Corp., 299 U.S. at 320. *See supra* note 74.

166. Buchanan, *supra* note 16, at 1170.

Articles of Confederation, that a stronger and effective central government was preferred to a weak one.[167] The *raison d'etre* of the constitutional blueprint was to replace administration by legislative committee (and not much of an administration, at that) with government by a single magistrate. Whether or not the Founding Fathers harbored an original intention that the President would have the power to decide to deploy armed forces into areas of hostilities or imminent hostilities, it is beyond question today that, of the three branches of government, this is most appropriately an Executive function, both by constitutional design and by the reality of conducting foreign policy.

This analysis is also supported by the constitutional concept of checks and balances. It is beyond doubt that Congress may control the President's use of the armed forces, among other ways, simply by placing limitations upon appropriations. Moreover, the Executive branch is required to continue to report to the Congress because of its oversight responsibilities and to continue to obtain funds. On a political level, the President must maintain good relations with Congress, lest he find political pressure applied along a spectrum of activities. Admittedly, Congress' checks against Presidential action cannot be implemented quickly.[168] Then again, the constitutional checks and balances were not intended to act speedily.

> That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.[169]

However, "Congressional unwillingness to use its constitutional powers cannot be deemed a sufficient reason for inventing new ways to act."[170]

The Congress can no more appropriate the power to decide to deploy U.S. armed forces into areas of hostilities or imminent hostilities, without specific legislation, *e.g.*, to conduct U.S. naval exercises off the Libyan coast or to escort ships in the Persian Gulf, than it could to recognize or to sever relations with another country.

a. *Case law*

The seminal case on the separation of branches of our government is *Myers v. United States*.[171] *Myers* arose when the President dismissed the Postmaster of Seattle, despite a law requiring the advice and consent of the Senate. In a thorough and scholarly analysis of the separation of gov-

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167. *See generally The Federalist* No. 70 (A. Hamilton), *supra* note 42.

168. *See infra* note 201.

169. Bowsher v. Synar, -— U.S. at -—, 54 U.S.L.W. 5064, 5066 (U.S. July 2, 1986).

170. Consumer Energy Council of America, Inc. v. Federal Energy Regulatory Commission, 673 F.2d 425, 477 (1982).

171. Myers v. United States, 272 U.S. 52.

ernmental branches and powers, the Court reasoned that the constitutional blueprint required a constant tension between the political branches of government.[172] This tension was designed to prevent any single branch from usurping the power of another. Since the Constitution itself was silent with respect to the power of removal,[173] the Court looked to how the tension between the political branches was to be maintained. In examining the structure of government, the Court quoted Madison, who observed:

> The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. . . . We ought always to consider the Constitution with an eye to the principles upon which it was founded. . . . [I]f the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the Legislative and Executive authorities in this respect; and hence it is said that the Constitution stipulates for the independence of each branch of the Government.[174]

Here was an explanation of the theory upon which the checks and balances were grounded. The Legislature and the Executive should have the ability to impose their wills on the other, to some extent, each within its constitutional mandate.[175] This led the Court to conclude that to allow Congress to have a "veto" over the dismissal of an officer of the Executive branch amounted to an overreaching of power, vesting too much control in Congress.[176] Besides, the power to dismiss an official is more properly

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172. For in this tension, or rivalry for supremacy, the Founding Fathers placed their hopes for co-equal branches which would prevent the collection of political powers in one branch or individual. *See generally The Federalist* No. 48 (J. Madison), *supra* note 42. Justice Brandeis noted in his dissenting opinion in *Myers* that

> [t]he doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the excercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. at 293 (Brandeis, J., dissenting). *See further* M. FARRAND, *supra* note 35, at 400 (statement of Mr. Dayton in the Senate, Nov. 4, 1803).

173. U.S. CONST. art. II, § 2, cl. 2 gives the President the power to make appointments, subject to the advice and consent of the Senate.

174. Myers v. United States, 272 U.S. at 128-129.

175. *See, e.g., Chadha*, 462 U.S. at 955 & n. 21.

176. In Buckley v. Valeo, 424 U.S. at 131-32, the Court held that Congress could not appoint a majority of the voting members of an independent commission (Federal Election Commission) because it violated the Appointments Clause. U.S. CONST. art. II, § 2, cl. 2. This amounted to an unconstitutional infringement upon executive power since the President is to nominate and, with the Senate's advice and consent, shall appoint all "Officers of the United States," even though "Congress has express authority to regulate congressional elections, by virtue of the power conferred in U.S. CONST. art. I, § 4. The Court's holding,

an Executive function than a legislative function. To hold otherwise, said the Court, would violate the principle of the separation of institutions.[177]

In the War Powers context, the same fundamental dilemma is posed. Professor Corwin characterized this as "an invitation to struggle for the privilege of directing American foreign policy."[178] How far can the Congress go without infringing upon the President's power and tipping the delicate constitutional balance in the struggle for control of foreign policy? The Congress has the power to raise the armed forces, to provide for their support, to define the qualifications for its members, to approve appointments and promotions of officers, and to prescribe rules for its conduct. It ultimately can control the use of the armed forces through the appropriations process. Can it also be said of the War Powers that the Congress may direct the Executive when and how to use the armed forces directly or through a legislative veto? How does this differ from ordering the President to give a prescribed set of policy instructions to the Postmaster General? In this sense, *Chadha* is implicated. In *Chadha*, the Attorney General was delegated certain powers, subject to a congressional veto. The Court found this violated the doctrine of the separation of institutions. The same reasoning applies to the War Powers Resolution, which allows Congress to veto the President's policy decision to use armed force. It is clear that the War Powers Resolution violates the separation of powers and institutions upon which our Constitution is based.

IV. IMPLICATIONS OF THE WAR POWERS RESOLUTION FOR CONDUCTING U.S. FOREIGN POLICY

One writer has noted that "the problem addressed by the War Powers Resolution is at least as much political as it is constitutional . . .."[179]

What effect, if any, does the War Powers Resolution have on the conduct of American foreign policy? First, it serves as a symbol to foreign nations that the Executive branch is not free to project military power, regardless of the political effectiveness such action could have.[180] Thus, the War Powers Resolution tends to make the United States look like a "Paper Tiger" in the eyes of many allies and other countries. Second, the

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however, rested upon the explicit nature of the Appointments Clause. In Consumer Energy v. F.E.R.C., 673 F.2d 425, the District of Columbia Court of Appeals struck down a statute providing for a rejection of an agency plan to deregulate natural gas prices should either house of Congress excercise a legislative veto. Following the holding of *Buckley v. Valeo*, the court observed that "[i]t would be anomalous in the extreme to hold that Congress may not appoint the officials who make rules, but may enact a mechanism permitting effective congressional control over those officials' decisions." *Id.* at 474. *See also* Springer v. Philippine Islands, 277 U.S. 189.

177. Myers, 272 U.S. at 167.

178. E. CORWIN, *supra* note 146, at 171.

179. P. HOLT, THE WAR POWERS RESOLUTION: THE ROLE OF CONGRESS IN U.S. ARMED INTERVENTION 1 (1978). *See also* Wallace, *supra* note 85, at 721 *et seq.*

180. *Cf.* notes and text accompanying notes 154-159, *supra.*

War Powers Resolution may actually encourage a group or a State to prolong a conflict beyond the 60 and 90 day deadlines. In this sense, the War Powers Resolution may actually encourage a higher intensity of fighting, and for a longer period of time, possibly foreclosing to the United States the opportunity to apply precise and swift force. Alternatively, it may force the U.S. to make otherwise unnecessary concessions in negotiations to terminate the American presence. Third, and perhaps a corollary of the second point, it may encourage a President to use overwhelming force where a smaller action was called for in order to avoid the 60 day provision. Fourth, the War Powers Resolution might force the Congress, for political reasons, to support a presidential action which, upon deliberative reflection, it might otherwise have opposed. Finally, the War Powers Resolution is an invitation to foreign States to wage a political struggle within the U.S. By virtue of our open society, we find that State sponsors of terrorism, such as Iran,[181] Libya[182] and Syria,[183] and even international terrorists like Yassir Arafat and Abu Abbas, have ready access to the American news media.[184] In some cases, this access has been employed skillfully in an attempt to divide the country politically through disinformation.

These drawbacks are most evident in the United States' effort to combat international terrorism. Following the U.S. raid on Libya in response to that country's continued State-sponsored terrorism,[185] there was wide disagreement on Capitol Hill whether the War Powers Resolution did or should apply.[186] The time may come when the President of the United States is compelled to strike a blow at the international terrorist network.[187] What he will need is the full support of the country, including the Congress, lest the action cause more harm (domestically) than good (internationally). But the War Powers Resolution may be triggered by events short of the actual use of force,[188] such as naval exercises off the Libyan coast — arguably an area of "imminent hostilities," or by escorting U.S.-flag vessels into the Persian Gulf during the Iran-Iraq war.[189]

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181. *See* Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U.L.REV. 117, 125 (1987).

182. *Id.*

183. *Id.* at 126.

184. *See generally* TERRORISM, THE MEDIA AND THE LAW (A. Miller ed. 1982).

185. Dale, *US defends Libya raid*, Financial Times (London), Apr. 16, 1986, at 1, col. 3; Weintraub, *American Bombers Strike Bases in Libya; President Asserts Raid Is In Retaliation For "Reign of Terror" Linked to Qaddafi*, N.Y. Times, April 15, 1986, at Al, col. 6; Wilson & Hoffman, *U.S. Warplanes Bomb Targets in Libya As 'Self-Defense' Against Terrorism*, Wash. Post, Apr. 15, 1986, at A1, col. 1.

186. Dewar & Walsh, *War Powers Act Scrutinized*, Wash. Post, Apr. 16, 1986, at A30, col. 1.

187. *See, e.g.*, Ottaway, *Schultz Emphasizes Use of Covert Antiterrorism, Vows to Consult Congress*, Wash. Post, May 16, 1986, at Al, col. 1.

188. *See, e.g.*, the examples cited *infra* at note 212.

189. Roberts, *Congress and White House at Odds Over Growing Presence in Gulf*, N.Y. Times, May 21, 1987, at A19, col. 1.

This also triggered debate on the applicability of the WPR.[190] One wonders whether it is unrealistic to require, as a matter of law, that the President consult the whole Congress[191] *before* American troops are engaged in hostilities or areas of potential hostilities? A sound U.S. foreign policy should not permit requiring the President to withdraw troops in 60 or 90 days because the Congress failed to take affirmative steps to approve the action. Among other things, this is an encouragement to terrorists to hold out until the War Powers Resolution requires the withdrawal of American forces. Turner has analogized this to

> the experience of French socialist Premier Mendes-France, who announced in June 1954 that he would resign if he did not succeed in arranging a cease-fire in Indochina by July 20 of that year. The communist delegations at the Geneva Conference realized that the longer they stalled the more concessions he would be willing to make to preserve his job. The serious negotiations took place during the final hours of July 20, and shortly before midnight the wall clock was unplugged to permit the French delegation to make a few more concessions within the artificial time deadline.[192]

At the very least, the WPR hands the terrorists yet another propaganda victory by forcing a political debate over the use of force *before* the action is concluded.

The natural and understandable response to this is that Congress should have a voice in the use of American armed forces. However, this cannot be effected by methods and processes which themselves undermine the Constitution. The proper Congressional role is three-part: legislative, budgetary and oversight. The Congress should be an active partner in Executive decisions relating to the use of U.S. armed forces. As a prac-

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On May 17, 1987, an Iraqi warplane fired two missiles, apparently in error, at the U.S.S. Stark, on patrol in the Persian Gulf. Thirty-seven American seamen were killed and the *Stark* was heavily damaged. Wilson & Cannon, *Iraqi Missile Sets U.S. Frigate Ablaze, Causing Casualties*, Wash. Post, May 18, 1987, at A1, col. 5. President Reagan felt compelled, for political reasons, to publicly state that the U.S. actions would not lead to war. Sciolino, *Reagan Says U.S. Presence In Gulf Won't Lead to War*, N.Y. Times, May 27, 1987, at A14, col. 5.

190. *See, e.g., Guns in August*, N.Y. Times, Aug. 12, 1987, at A22, col. 1 (editorial); Adams, *Invoke the War Powers Act*, Wash. Post, June 29, 1987, at A13, col. 3; Cannon, *President Minimizes War Risk, But Senators Warn Of U.S. Involvement In Iran-Iraq Conflict*, Wash. Post, May 28, 1987, at A1, col. 6. *Compare* 133 Cong. Rec. S7,262-63 (daily ed. May 28, 1987) (statement of Sen. Helms)(arguing against applicability of WPR) with letter from Sen. Claiborne Pell to Sec'y of State Shultz (May 21, 1987) (arguing in favor of applicability of WPR).

191. If, as the war Powers Resolution claims, the Congress has the exclusive war power, what is the constitutional validity of consulting with only a handful of Congressional leaders? Is not the Congress, as an institution, to be consulted if there is a constitutional requirement? On a practical level, the most that can and, perhaps, should be expected is that Presidents will consult with Congressional leaders to obtain a sense of the Congress and to make a symbolic attempt to work in tandem with the legislature prior to and during the use of armed force abroad.

192. TURNER, *supra* note 34, at 687.

tical matter, no use of armed force will succeed without at least some support from Cognress.[193] One must avoid overstating the virtues of the Congress at the expense of the Executive by overlooking the effect of the inevitable swings of public opinion on Congress' position on the use of force. After the First World War, the isolationists in Congress effectively eviscerated the Executive's foreign policy powers. It is generally agreed that our international relations in the inter-war period were, perhaps, the worst in our history. Partly as a consequence, the Presidency emerged as not the preeminent, but the exclusive organ of foreign relations upon the U.S.' entry into the Second World War. Indeed, the popular perception, inside and outside of Congress at that time, was that the legislative branch was not to be trusted with foreign policy. It was not until the twin political crises of Vietnam and Watergate that the pendulum swang the other way, leading to a resurgence of Congressional power — and the War Powers Resolution.[194] In noting this phenomenon of American politics, Walter Lippmann observed that

> [t]he unhappy truth is that the prevailing public opinion has been destructively wrong at the critical junctures. The people have imposed a veto upon the judgments of informed and responsible officials. They have compelled the governments, which usually knew what would have been wiser, or was necessary, or was more expedient, to be too late with too little, or too long with too much, too pacifist in peace and too bellicose in war, too neutralist or appeasing in negotiation or too intransigent. Mass opinion has acquired mounting power in this century. It has shown itself to be a dangerous master of decision when the stakes are life and death.[195]

In this, Lippmann echoed the astute observations of Alexis de Tocqueville, who noted "[t]he propensity which democracies have to obey the impulse of passion rather than the suggestions of prudence . . .."[196] Referring to England's political leadership during the second half of the 1930s, Winston Churchill summarized the prevailing credo: "I am their leader, therefore I must follow them."

One must not generalize from this to say that Congress, because it is most susceptible to the whims of public opinion, should hold or should exercise all or none of the War Powers.[197] In fact, American Presidents

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193. Revely observed that "the constitution does impose an iron demand on the President and Congress: that they cooperate if any sustained venture for war or peace is to succeed." W. REVELY, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROW AND OLIVE BRANCH? 49 (1981).

194. Rostow, *Once More Unto the Breach: The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1 (1986).

195. W. LIPPMANN, THE PUBLIC PHILOSOPHER 23 (1955).

196. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA Ch. 13, p. 273 (H. Reeve trans. 1974).

197. *But see* Talbot v. Seemans, 5 U.S. (1 Cranch) at 28, in which Chief Justice Marshall said that "[t]he whole powers of war being, by the constitution of the United States, vested in congress . . .. At least one scholar has stated that Marshall had in mind a federal-

should and frequently do consult with congressional leaders prior to engaging American forces in hostilities. Often, however, secrecy and speed are the essential ingredients to a successful foreign policy, including the use of force.[198] Professor Aron observed that "[t]he weapons of mass destruction, the techniques of subversion, the ubiquity of military force because of aviation and electronics, introduce new human and material factors which render the lessons of the past equivocal at best."[199] Consider, for example, President Kennedy's employment of armed forces during the Cuban Missile Crisis, President Johnson's invasion of the Dominican Republic, President Carter's ill-fated Iranian rescue mission and President Reagan's actions in Grenada. Should the whole Congress have been consulted? What of speed and secrecy?

To recognize contemporary political realities is not to deny that the Congress possesses legitimate — and vital — powers. Presidents are politically dependent upon the Congress for continued support,[200] both for the use of the troops as well as for the entire range of domestic and foreign policies. A President can ill afford to alienate the Congress, especially on an issue as sensitive as the use of American troops. In this sense, the War Powers Resolution is superfluous.

Moreover, the War Powers Resolution is a disservice to the Congress and the country. It forces the Congress to confront the use of force in an artificially narrow period, depriving it of the time to gain a perspective on the armed conflict, to weigh the effectiveness of the action in terms of U.S. foreign policy objectives and to determine, as far as possible, whether the use of force will achieve those objectives. In most cases, the

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ism issue when he wrote this, *i.e.*, that the federal government, and not the *states*, had the "whole powers of war." B. ZIEGLER, *supra* note 73. This was the first case decided by the Supreme Court after Marshall's appointment. 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919).

198. Certainly this was recognized with respect to the negotiation of treaties. *See The Federalist* No. 64 (J. Jay), *supra* note 42, at 327; *The Federalist* No. 75 (A. Hamilton), *supra* note 42, at 379.

199. R. ARON, *supra* note 155, at 2.

200. One respected scholar observed that there are constitutional limitations on Congress' power to control executive conduct of armed conflict through the appropriations process. *See* Wallace, *supra* note 85, at 748-52. This also seems to be the position taken by Monroe Leigh when he was State Department Adviser, when he testified that:

> I do believe personally that such matters [as the Cambodia and Vietnam evacuations] involve the inherent constitutional power of the President and I don't think that every limitation that Congress might enact on an appropriation or otherwise is necessarily a constitutional one. I think there are some that would be plainly unconstitutional.

Hearings on Compliance with the War Powers Resolution Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 1st Sess. 35 (testimony of Monroe Leigh) (1975).

It has been stated, however, that the Supreme Court has never held unconstitutional any use of the appropriations power as a counter-weight to Presidential action. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. No. 82, 92d Cong., 2d Sess. 1597-1619 (1973).

use of force is popular in at least the first two or three months; because of this, Congress may give its blessing to an armed conflict by riding the crest of nationalistic fervor. The strength of the Congress lies in its thorough — and time-consuming — "step-by-step, deliberate and deliberative process,"[201] evaluating all the facts, discussing all the issues, before committing itself.

The War Powers Resolution was designed to deal with one President and one armed conflict.[202] The Congressional override of the presidential veto came less than three weeks after the "Saturday night massacre," when Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than dismiss Watergate special prosecutor Archibald Cox.[203] But would the War Powers Resolution have prevented the Vietnam episode? The answer is probably not.[204] The Gulf of Tonkin Resolution[205] almost certainly gave the President the legal sup-

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201. *Chadha*, 462 U.S. at 959. "What emerges from our analysis of the purpose of the law making restrictions in Article I is that the Framers were determined that the legislative power should be difficult to employ." Consumer Energy Council of America v. F.E.R.C., 673 F. 2d at 464. *Cf.* the statement by former Senator Javits that

> [i]n most situations, even when a clear consensus is presented, it takes a long time for Congress to make its legislative will, owing, in large measure, to the various forms a single, affirmative, legislative remedy may take. A simple and unamenable resolution of approval or disapproval adopted pursuant to a legislative veto provision incorporated into an earlier statute, however, avoids the institutional delays and permits expedited postenactment review.

Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. REV. 455, 462 (1977).

202. Eugene Rostow observed just prior to the enactment of the War Powers Resolution that [w]e wisely refrained from curbing the powers of the Supreme Court even after the catastrophic error of *Dred Scott*. The same calm prudence should guide our course now, with respect to the Presidency. Rostow, *Great Cases Make Bad Law: The War Powers Act*, *supra* note 61, at 836.

203. It is at best problematic that the veto of the War Powers Resolution would have been overridden absent the unique domestic political conditions in the country at the time, and especially the "Saturday night massacre." *See* R. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 109 (1983); TURNER, *supra* note 34, at 685.

204. *See supra* the cases cited in note 120.

205. H.R.J. Res. 1145, 88th Cong., 2d Sess. (1964); Pub. L. No. 88-408, 78 Stat. 384, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 441-42. The Gulf of Tonkin Resolution provides that

> The Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggresssion.
>
> Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

port required by Section 5(b) of the War Powers Resolution to bypass the entire issue of the 60 or 90 day deadlines.[206] In fact, as previously noted, the Congress enabled the President to continue American involvement in Vietnam through the draft and massive appropriations.[207]

The War Powers Resolution would have had a devastating impact, however, on the United States' entry into the Second World War. The American Congress was unalterably opposed to entering the war against Germany between 1939 and 1941, even as Hitler tightened his grip on Europe and the Battle of Britain raged.[208] It is often overlooked that in August 1941, the House of Representatives renewed mandatory conscription by a single vote.[209] This led President Franklin Roosevelt, who favored an early U.S. entry into the war, to confide at the close of the Argentia summit conference that he intended to wage war, not to declare it.[210] The same can be said of the United States' entry into the First World War and repelling the invasion of South Korea. Would Presidents Wilson or Truman have risked precipitating a constitutional crisis by challenging the War Powers Resolution?[211] Perhaps they would have felt compelled to do so; but would a constitutional crisis have been in the

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> Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by the actions of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

On the Tonkin Gulf Resolution, see generally J. GALLOWAY, THE GULF OF TONKIN RESOLUTION (1970). *See also The Gulf of Tonkin, The 1964 Incident: Hearing Before the Senate Comm. on Foreign Relations*, 90th Cong., 2d Sess. (1968). The Gulf Of Tonkin Resolution was repealed in January 1971, Pub. L. No. 91-672; 84 Stat. 2053, 2055, 91st Cong., 2d Sess. (1971).

206. *Compare*, for example, the remarks of Sen. Fulbright, 110 CONG. REC. 18,409 (1964), *with* Sen. Morse, 110 CONG. REC. 18,430 (1964).

207. *See, e.g.*, Supplemental Appropriation, Pub. L. No. 89-18, 79 Stat. 109; Defense Appropriations Act, Pub. L. No. 91-171 § 638, 83 Stat. 469, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 507.

208. When President Roosevelt warned the Congress in 1939 that the world was teetering on the brink of war, Senator William E. Borah stated that there would be no war with Germany. "I have my own sources of information," he said, insisting on continuing the policy of isolationism. W. LANGER & S. GLEASON, THE CHALLENGE TO ISOLATION, 1937-1940 144 (1952).

209. G. PRANGE, *supra* note 132, at 178. "No wonder that Nomura [Japan's Ambassador to the United States] could never quite convince the Foreign Ministry that the Americans 'meant business'; talk and bluster were cheap, but when it came to a hard vote to lay before their constituents, Congress felt safe in nearly scuttling the draft." *Id.*

210. *See, e.g.*, J. COLVILLE, THE FRINGES OF POWER: 10 DOWNING STREET DIARIES 1939-1955 428 (1985); P. ABBAZIA, MR. ROOSEVELT'S NAVY: THE PRIVATE WAR OF THE U.S. ATLANTIC FLEET, 1939-1942 220 (1975); 6 M. GILBERT, WINSTON S. CHURCHILL: FINEST HOUR, 1939-1941 1168 (1983). In fact, this is precisely what Roosevelt did *prior* to formal hostilities, with the Destroyers for Bases deal, see *supra* note 67, and with the so-called War in the Atlantic, in which Roosevelt declared that any German or Italian warship in the western half of the Atlantic would be attacked by the U.S. Navy. *See, e.g.*, note 139.

211. Senator Robert C. Byrd stated that "the *Chadha* decision has driven us to attempt to correct what would probably be a constitutional crisis at exactly a time the Nation could not afford it." 129 CONG. REC. S14,164 (daily ed. Oct. 19, 1983).

country's best interest at so delicate a period? President Nixon argued that the War Powers Resolution "would have vastly complicated or even made impossible" the U.S. actions in the 1961 Berlin Crisis, the Cuban Missile Crisis, the Congo rescue operation in 1964 and the 1970 Jordanian Crisis.[212] He went on to observe that the War Powers Resolution would

> undercut the ability of the United States to act as an effective influence for peace. For example, the provisions automatically cutting off certain authorities after 60 days unless they are extended by the Congress could work to prolong or intensify a crisis. Until the Congress suspended the deadline, there would be at least a chance of United States withdrawal and an adversary would be tempted therefore to postpone serious negotiations until the 60 days were up. Only after the Congress acted would there be a strong incentive for an adversary to negotiate. In addition, the very existence of a deadline could lead to an escalation of hostilities in order to achieve certain objectives before the 60 days expire.[213]

As tragic as the American experience was in Vietnam, this cannot erase the lessons learned throughout our history, that the President is far better equipped than the Congress to determine when armed force should be used. The effect of the War Powers Resolution is to undermine the ability of the President to project military power. This is especially important when the United States is confronted with acts of international terrorism, where speedy and decisive action may be required.

V. CONCLUSION

Sections 5(b) and (c) of the War Powers Resolution are unconstitutional because they act as a legislative veto, contrary to the Supreme Court's holding in *Chadha*, and because they impinge upon the Executive's war and foreign affairs powers. Section 5(c) is unconstitutional because it purports to grant to Congress the power to require the President to withdraw U.S. armed forces pursuant to a concurrent resolution. Thus, an action undertaken by the President can be vetoed by a simple majority congressional vote. Section 5(b) is unconstitutional on two grounds; first, it seeks to limit Presidential authority to use armed forces to a 60 or 90 day time period, unless specifically extended by the Congress, giving rise to a legislative veto of Executive action. Moreover, Section 5(b) impinges upon the President's constitutional authority to use armed force pursuant to his Executive and foreign policy powers, violating the doctrine of the

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212. "Veto of the War Powers Resolution," *supra* note 2. Professor Rostow found that the War Powers Resolution would have made "illegal": "the expedition of Commodore Perry to Japan"; "mobilization of troops to the Mexican border after the Civil War to persuade France to abandon support of Maximillian"; "President Nixon's policies towards China . . . because the heart of those policies is a diplomatic warning to the Soviet Union not to make war on China"; and, U.S. actions in the 1973 Middle East war. Rostow, *Comment*, 61 VA. L. REV. 797, 803-04 (1975).

213. "Veto of War Powers Resolution," *supra* note 2.

separation of powers and institutions.

As a matter of policy, the War Powers Resolution has undermined the United States' ability to project military power as a means of conducting foreign policy by creating uncertainty as to the U.S. commitment and by ensuring an untimely insertion of Congress in the decision-making process. The Congress has a major and ultimately decisive role to play with respect to the use of U.S. armed forces. However, congressional powers are limited by the Constitution. The use of the armed forces is an Executive function; providing for their support is a Legislative function. The President should, and often does, consult with congressional leaders prior to sending U.S. armed forces into combat. This is a matter of comity and politics but not a constitutional requirement.

Finally, the War Powers Resolution is ineffective. It would not have prevented the Vietnam war. However, it may hamper the effective use of force against international terrorism by creating an artificial controversy and by precipitating a constitutional crisis at a time when a united political front is needed.

Political Violence and International Law: The Case of Northern Ireland

ALPHA M. CONNELLY*

I. INTRODUCTION

In the best tradition of British understatement, the violence of the last twenty years in Northern Ireland is referred to locally as "the Troubles". Sparked off by civil rights grievances, the Troubles are but the latest chapter in a long-running saga of armed resistance to a British presence in Ireland. The forefront of the resistance in this century has been the Irish Republican Army. Today armed resistance is concentrated in Northern Ireland, which is constitutionally part of the United Kingdom. Here the I.R.A. claims to be waging a war of national liberation on behalf of the Irish people against alien, i.e. British rule. In this scenario, the British troops in Northern Ireland are seen not as knights in shining armor upholding law and order and protecting the ordinary citizen, but as forces of occupation, oppressors who would deny to the Irish people the realization of their right to self-determination. This paper will examine the claim of the I.R.A. at the present day to be an army of national liberation.[1] The legitimacy of the claim will be assessed against the norms and principles of public international law. The I.R.A. itself asserts not only a moral right to use violence but also a legal right, expressly invoking recog-

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1. In this paper the term I.R.A. is used to signify the Provisional Irish Republican Army. The Provisional I.R.A. is not the only body using armed force in Northern Ireland apart from the British army and the police. There are other groups both on the loyalist/unionist side and on the nationalist side which use force either, as in the case of the loyalists, to maintain the link with Britain, or, as in the case of the nationalists, to sever the link. The Provisional I.R.A. is the largest organized grouping of a military character to promote the nationalist cause. There is some uncertainty over whether the Official I.R.A., from which the Provisionals split in 1969/70, has in fact disbanded, but whether or not it has done so, it is clear that the Officials have not engaged in any significant military action in recent years and that, as they moved to the left politically, the voices advocating the use of the established political process rather than violence in pursuit of national unity prevailed. The other main nationalist grouping, the Irish National Liberation Army, which was established in 1975, has itself recently split over the question of its continued existence, and has been subject to a bitter internal feud, with members of rival factions killing one another. The examination in this paper of the claim of the Provisional I.R.A. applies *mutatis mutandis* to these other militant nationalist groups. The claimed justification for resort to force by loyalist paramilitary organizations, such as the Ulster Volunteer Force and the Ulster Freedom Fighters, is of course somewhat different to that of the I.R.A., and any examination of their claims is outside the scope of this paper.

nized principles of international law to validate its actions.[2]

International law has traditionally applied, and still applies, two general tests in relation to armed conflicts to determine the legality of the use of violence, and each test is based on a different body of rules. The first is a threshold test with respect to the legality of the initial resort to violence. In its application to inter-state conflict, this test is often described by the Latin tag, *jus in bellum*, the right to go to war or to engage in armed conflict. It is, for example, universally recognized that one state is entitled to use armed force against another in self-defense, and international law defines the circumstances in which resort to armed force by way of self-defense is justified. In the post-1945 era, the concept of international armed conflict has been extended to cover situations other than the classic inter-state combat, and a threshold test also applies to these other situations. Of particular relevance to this paper is the fact that, in recent years, there has been increasing recognition of the legitimacy of resort to force by an entity other than the state. This entity is a people, and the circumstances in which a people (or their representatives) are justified in resorting to force is when the people are subject to colonial domination or alien occupation, resort to force being justified against the colonizer or occupying power. The people often perceive of themselves (and are perceived) as a nation, and hence when force is used to reject alien rule, the struggle is described as a war of national liberation. The I.R.A. claim relates to this threshold test. It is a claim that the I.R.A. is waging in Northern Ireland a war of national liberation on behalf of the Irish people against a colonial power.[3]

The threshold test is a group test. It applies to a state, a people, or some other collectivity, and is used to assess the legality of resort to force by the collectivity. It does not apply to specific incidents of violence engaged in by the group or by members of the group. These incidents are judged by other rules.

When armed conflict erupts, there is an extensive body of rules and principles of international law, *jus in bello*, which seeks to regulate the conflict. There are rules regulating both international armed conflicts (the type of armed conflict in which the I.R.A. claims to be engaged) and non-international armed conflicts.[4] These rules, known collectively as international humanitarian law, have been supplemented over the last forty years or so by international human rights norms and an evolving international criminal law which penalizes certain activities (e.g. genocide and

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2. SINN FEIN, A SCENARIO FOR PEACE: A DISCUSSION PAPER 3-4 (1987).

3. Although the I.R.A. regard the Southern Irish authorities as illegitimate, and indeed as having aligned themselves politically and economically with Britain, it is I.R.A. policy not to use violence against these authorities. *See, e.g.*, G. ADAMS, THE POLITICS OF IRISH FREEDOM 39f (1986), and T.P. COOGAN, THE I.R.A. 327-8, 681 (3d ed. 1987).

4. *See, e.g.*, the two Geneva Protocols of 1977 Additional to the Geneva Conventions of 12 August 1949. Protocol I relates to the Protection of Victims of International Armed Conflicts; Protocol II to the Protection of Victims of Non-International Armed Conflicts.

hijacking) both in time of peace and of armed conflict. Even if the use of violence does not meet the minimum level required to constitute an armed conflict and hence be governed by the rules of international humanitarian law, international criminal law will apply to the activities of all those engaged in violent conduct, and the state authorities will additionally be bound by the norms of international human rights law.

The term international armed conflict now includes wars of national liberation,[5] and if, as the I.R.A. claims, the present violence in Northern Ireland is occurring in the context of such a war, then the rules of international humanitarian law relating to international armed conflicts apply. If it is not, then other rules apply. The important point is that irrespective of the precise categorization of the violence under international law, and irrespective of the legitimacy of the I.R.A. claim, some rules apply, and members of the I.R.A. as well as of the state authorities may be held accountable under international law for their conduct. Even a legitimate cause does not of itself legitimate every use of violence by those fighting for the cause. Even a war of national liberation does not necessarily validate every act of violence by the liberation army and its individual members.

This paper is concerned with the threshold test of the legality under international law of the I.R.A.'s resort to violence. It is not concerned with the legality of specific incidents or tactics. Nor is it concerned with the ethics or politics of the I.R.A. claim. It does not deal with whether the I.R.A. should be regarded as a national liberation movement, but with whether it is so recognized under international law at the present time and with whether its claim to be exercising the right of self-determination of the Irish people is well-founded in law or not. The self-perception of a group is not sufficient in law to confer on it the status claimed. The group must fulfil the requirements posited by law for the enjoyment of that status.

II. THE I.R.A. CLAIM

The beacon of militant Irish nationalism in this century is the Proclamation of the Irish Republic on Easter Monday, 1916, by a motley collection of insurrectionaries outside the main post office in the center of Dublin. The Proclamation, "the Magna Carta of all Irish Republicans",[6] was signed by seven men claiming to speak on behalf of the Provisional Government of the Republic of Ireland, and was addressed by that Government to the people of Ireland:

> "Irishmen and Irishwomen: In the name of God and of the dead generations from which she receives her old tradition of nationhood, Ireland, through us, summons her children to her flag and strikes for her freedom. . . .

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5. Geneva Protocol I, Art.1(4).
6. COOGAN, *supra* note 3, at 38.

> We declare the right of the people of Ireland to the ownership of Ireland and to the unfettered control of Irish destinies, to be sovereign and indefeasible. The long usurpation of that right by a foreign people and government has not extinguished the right, nor can it ever be extinguished except by the destruction of the Irish people. In every generation the Irish people have asserted their right to national freedom and sovereignty. . . Standing on that fundamental right and again asserting it in arms in the face of the world, we hereby proclaim the Irish Republic as a Sovereign Independent State, and we pledge our lives and the lives of our comrades-in-arms to the cause of its freedom, of its welfare and of its exaltation among the nations. . . .
>
> Until our arms have brought the opportune moment for the establishing of a permanent National Government, representative of the whole people of Ireland, and elected by the suffrages of all her men and women, the Provisional Government, hereby constituted, will administer the civil and military affairs of the Republic in trust for the people. . ."(extracts from the Proclamation).

Neither the Sovereign Independent State nor the permanent National Government, representative of the whole people of Ireland, envisaged by the Proclamation, have ever come into existence. The insurrection, or the Rising as it is popularly known, was a failure. However, in the history of Irish nationalism, nothing succeeds like failure, especially a bloody failure. The execution by the British of many of the leaders of the Rising elicited revulsion among the Irish people and ensured that the high-sounding phrases of the Proclamation would echo down the century, assuring and inspiring those who see in Northern Ireland the continued denial by an alien government of the right of the Irish people to control its own destiny.

Irish nationalism was of course not born in 1916. It has its roots deep in the past in wars of conquest, resistance, reconquest and renewed resistance. Despite centuries of rule by England, the Irish were never assimilated. They retained a sense of separate identity, an identity which accommodated without yielding to colonial influences. The English common law may have replaced the Irish Brehon law, but the Irish maintained different traditions and culture to the conqueror. The use of the Irish language may have diminished in favor of English, but as Engels remarked, "The more the Irish accepted the English language and forgot their own, the more Irish they became".[7] And religion had a part to play in this maintenance of a separate identity. The colonizer was Protestant, the indigenous people Catholic.

The association of religion with domination and exploitation is today nowhere more evident than in Northern Ireland where sectarianism presents a direct challenge to the noble Republican aspiration of substituting "the common name of Irishmen in place of the denomination of

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7. *The Prepatory Material for the History of Ireland*, quoted in S. CRONIN, IRISH NATIONALISM: A HISTORY OF ITS ROOTS AND IDEOLOGY 11 (1980).

Protestant, Catholic and Dissenter" (Wolfe Tone). The seeds of this conflict were sown in the Ulster plantation of the early seventeenth century when the British confiscated vast tracts of land in the northeast of the country and handed them over to English and Scottish settlers. The English settlers were Anglican by religion, the Scots Presbyterian. The settlers prospered, and to be Protestant was to be part of the ascendancy, to be Catholic was to be disadvantaged and, for the most part, poor. The deprivation and discrimination suffered over the years by Catholics in the north of the island fuelled a resentment which later found expression in the civil rights movement of the 1960s and a more militant voice in the long tradition of armed resistance by the I.R.A. to British oppression.

Were it not for the partition of Ireland, the I.R.A. would not exist today, but rather would enjoy pride of place in Irish history books as national heroes who contributed to the creation of the Republic proclaimed in 1916. But Northern Ireland remains part of the United Kingdom, and the I.R.A., weathering internal splits and repression by both the British and Irish authorities, has survived. Seventy years on from the Rising, the I.R.A. still claims to be an army of national liberation, fighting to remove the last vestiges of colonial occupation by the British from the northeastern part of Ireland.

The last all-Ireland Parliamentary elections were held in December 1918, when Sinn Fein, the political associates of the I.R.A., won 73 of the 105 Irish seats in the British Parliament. Instead of taking up these seats, those of the 73 who were not in jail or elsewhere on Republican business met in Dublin, in January 1919, and held their own parliament, the first Irish Dail.[8] The Dail described itself as the parliament of the Irish Republic 'proclaimed in Dublin on Easter Monday, 1916, by the Irish Republican Army acting on behalf of the Irish people', and *inter alia* adopted a Programme of Social and Democratic Rights based on the 1916 Proclamation. The Dail was of course not recognized by Britain, and it met clandestinely while hostilities with Britain continued. In 1920, the British Parliament passed the Government of Ireland Act which effectively partitioned Ireland. Under this Act, there were to be two parliaments in Ireland, both bicameral, one in the North in the six counties, and one in the South. The first Dail refused to recognize these new institutions, and when, in 1921, elections were held to the lower house of the Southern parliament, it regarded the elections as being held for a second Dail. In the election, 124 Sinn Fein candidates were returned unopposed. Later in 1921 an Anglo-Irish Treaty was agreed by British and Irish representatives, and was approved by the Dail in January 1922, by 64 votes to 57.

Under the Treaty, a degree of independence was conferred on the 26

8. On the first and second Dails, and the repudiation by the I.R.A. of the 1921 Treaty, *see* COOGAN, *supra* note 3, at 40-51; CRONIN, *supra* note 7, at 123-4, 131f; and J. BOWYER BELL, THE SECRET ARMY: THE I.R.A. 1916-1979 18-21, 25-26, 30-31 (rev. ed. 1979).

counties which were henceforth to be known as the Irish Free State. The new State fell far short of the Irish Republic proclaimed in 1916. For one thing, it did not encompass the whole island, but only 26 of its 32 counties. The six counties in the North were allowed to opt out of the Free State and to retain their own parliament and government and status as part of the United Kingdom. For another, the 26 counties became a self-governing dominion of the British Empire, on a par with Australia, Canada, New Zealand and South Africa, and its status within an empire was marked by the presence of a British Governor-General in Dublin. Members of the new southern Parliament also had to swear an oath of allegiance to the British Crown, and the British retained control of a number of Irish ports. Those Dail deputies who opposed the Treaty walked out of the southern Parliament, and an I.R.A. convention in Dublin rejected the Treaty and affirmed its allegiance to an all-Ireland Republic. In the I.R.A. interpretation of Irish history, it is its army council which is today the provisional government of the Irish people and 'the direct lineal successor of the Provisional Government of 1916, the first Dail of 1919 and the second Dail of 1921'.[9]

In the I.R.A. view, neither the Free State Parliament and Government, nor their successors under the 1937 Constitution of Ireland, represent the Irish people. Indeed, they are usurpers who have betrayed the Republic proclaimed in 1916. Over time the imperial ties of the Free State with Britain were severed. An Irish Government under De Valera subsequently abolished the oath of allegiance, persuaded the British to relinquish control of the ports, and eventually secured the adoption of a new Irish Constitution. Under this Constitution, the Governor-General was replaced by a President, and in 1948 the Irish Parliament passed legislation declaring the State to be a Republic. Yet, according to the I.R.A. view, while six counties in the North remain under British rule, Ireland, is not, and cannot be, truly independent. The maintenance of the link between Northern Ireland and Britain is a colonial remnant, left over from the Anglo-Irish Treaty of 1921; and it is the I.R.A. and its political wing, Sinn Fein,[10] which have remained faithful to the Irish Republic of 1916 and who are the true representatives of the Irish people. Neither the '21 Treaty nor events subsequent thereto have brought about the complete decolonization of Ireland. British troops in Northern Ireland are an army of occupation, and the I.R.A. is engaged in a war of national liberation on behalf of the Irish people against an alien, occupying power.

Such is the claim. Let us examine it against the rules and principles of international law.

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9. *I.R.A., Green Book*, quoted in COOGAN, *supra* note 3, at 685.

10. When on 2 November 1986, at its annual meeting in Dublin, Sinn Fein dropped its abstentionist policy with respect to participation in the Irish Parliament and decided to contest the next general elections in the South, a splinter group which favored continued abstention formed, calling itself Republican Sinn Fein.

III. ASSESSMENT

A. The Right of Self-Determination

The word "self-determination" appears to have entered the language of politics in the mid nineteenth century in connection with the European nationalism of that day.[11] It does not feature in the Covenant of the League of Nations, but when the U.N. Charter was adopted in 1945, it was included, in tandem with equal rights, as a principle of international law.[12] Post 1945, this principle has been developed and fleshed out in the practice of the United Nations, mainly in the context of that organization's decolonization program, but now also extending to situations of alien domination and occupation as well as racist regimes. Important documents include the 1960 U.N. General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, the 1966 International Human Rights Covenants, the 1970 U.N. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States,[13] and the 1974 Assembly Resolution on the Definition of Aggression. In these documents, self-determination is no longer referred to simply as a principle of international law, but as a right enjoyed by peoples. It has been lifted out of the exclusively colonial context and brought within the international movement for the promotion and protection of human rights. In fact, on one widely-held view of the right of self-determination, it is a prerequisite for the enjoyment of all individual human rights.[14] The evolution of the principle post 1945 outside the U.N. has entailed a similar broadening of its application to situations of alien domination and exploitation. Recent landmarks include the 1977 Geneva Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, and the 1981 African Charter of Human and Peoples' Rights.

As evidenced by such texts as the International Human Rights Covenants and the African Charter, the right of self-determination is now widely recognized as a matter of treaty law. Indeed, these treaties, together with other evidence of state practice such as that mentioned above, suggest that self-determination is now a universally recognized right pertaining to peoples under customary international law.

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11. *See, e.g.*, U.O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 3 (1972).

12. Arts.1(2) and 55.

13. These international texts are specifically cited by Sinn Fein in support of the right of the Irish People to sovereignty, independence and unity: *see* Fein, *supra* note 2, at 3-4.

14. *See, e.g.*, H. Gros Espiell, The Right to Self-Determination: Implementation of United Nations Resolutions, Report presented to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities para.78, E/CN./sub.2/405/Rev.1 (1980); and A. Cristescu, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments, Report presented to the Sub-Commission para.228, E/CN./sub.2/404/Rev.1 (1981).

The I.R.A. claim to be exercising the right of self-determination of the Irish people therefore has a basis in international law in that the existence of such a right is generally accepted by the international community of states at the present time. In its political dimension,[15] self-determination signifies the right of a people to reject colonial rule or other forms of alien domination and the freedom to choose both their own external political status and their own form of government. With respect to choice of political status, the international texts mention a range of options from emergence as a sovereign independent state to integration with an existing independent state. With respect to choice of government, racist regimes are precluded by many of the international texts, and such regimes are in fact viewed as a legacy of colonial oppression and alien domination. Otherwise the choice would appear to be an open one.

The I.R.A. claim cites two principal justifications for regarding Northern Ireland as a self-determination issue: firstly, that Northern Ireland is a colony of Britain; and secondly, that it is subject to alien occupation.[16]

While there is an obvious overlap between the two justifications in that when a people is subject to colonial rule, it is also *ipso facto* subject to alien domination, the latter may take forms other than colonial rule. The argument that Northern Ireland is under foreign occupation of a variety other than the colonial cannot be seriously entertained. Indeed, between 1922 and 1972, until the introduction of direct rule from London, Northern Ireland had its own regional legislative assembly and government, flawed though these institutions may have been in terms of representing the interests of all sections of the population of Northern Ireland. Attempts to revive and to remodel such institutions since 1972 have failed, and direct rule by Britain continues to be the order of the day. The argument that this constitutes alien rule, and that the British forces in Northern Ireland are an army of occupation, does not afford a distinct legal basis for the I.R.A. claim, but is rather a variant of the contention that Northern Ireland is a British colony.

As we have seen, the Irish people never entirely accepted being ruled by Britain or forming part of a larger political unit comprising both Ireland and Great Britain. They retained a sense of distinct identity and resented being governed by what they regarded as an alien administration. This resentment surfaced periodically in violent resistance and Irish

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15. For the economic, social and cultural dimensions *see, e.g.*, Espiell, *supra* note 14, paras.135-165, and Cristescu, *supra* note 14, chs.V-VII.

16. The I.R.A. sometimes analogize between the administration of Northern Ireland and racist regimes. It is alleged that the administration discriminates against a nationalist, predominantly Catholic minority, and that this is analogous to racism, e.g. in South Africa. The international texts on self-determination mention only racist regimes and contain no reference to other forms of oppressive government unless they be "alien" or "colonial". The allegation is more suited to the non-discrimination norms of international human rights law, and does not specifically fall within the law relating to self-determination.

history records a panoply of national heroes and heroines, some operating within the established political structures of the day to advance Irish independence, others without. The problem for Irish unity is that, for the last three to four hundred years, a significant number of the inhabitants of Ireland, concentrated in the northeastern part of the island, do not share this sense of Irishness, but see themselves either as British or as a different variety of Irish to the rest of the inhabitants. The I.R.A. claim sees the Irish people as comprising the whole population of the island, including the loyalist concentration in the northeastern corner. The loyalists may be reluctant Irishmen and women but, in that they inhabit an island which was colonized by Britain and the majority of the inhabitants of that island wish it to have an existence separate from Britain as a sovereign, independent state, the veto which the loyalists have been allowed to exercise over the unity of the country for the last 65 years is, in the I.R.A. view, invalid and contrary to the right of self-determination of the whole people.

There is some strength in this argument in that most colonial territories have been treated as a unit for the purpose of decolonization. Colonies with many disparate ethnic groups within their borders have become independent without reference to the wishes of each of the component parts, and any tension between groups has been treated as a problem to be resolved post-decolonization by the new state. However, although this has been the predominant pattern of decolonization, it has not been a uniform pattern. There have been instances of a colonial territory being divided, and of the wishes of the inhabitants of one part of the territory being respected when they did not accord with those of the inhabitants of another part or parts. Thus, the Belgian colony of Ruanda-Urundi was granted independence as two separate states, Rwanda and Burundi; and the northern region of the British Cameroons joined with Nigeria, the southern with the state of Cameroun.[17]

The argument is therefore not watertight. The counter-argument, that decolonization was effected under the Government of Ireland Act 1920 and the Anglo-Irish Treaty 1921, also has merit. But even if it is accepted that the decolonization of Ireland in 1920/1921 was only partial, that Northern Ireland is a colonial remnant, and that full decolonization in line with the wishes of the majority of the inhabitants of the island has yet to occur, there remains one important question with respect to the I.R.A. claim — the entitlement of the I.R.A. to speak and act on behalf of the Irish people, and this involves consideration of the status of national liberation movements under international law and of the credentials of any group claiming to be such a movement.

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17. *See, e.g.*, M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 19-20 (1982) for these and other examples.

B. National Liberation Movements

National liberation movements clearly enjoy a degree of legal personality under international law. Organizations such as the Palestine Liberation Organization and the South-West Africa People's Organization have been afforded observer status in a number of intergovernmental bodies including the U.N. The League of Arab States has repeatedly endorsed the right of the P.L.O. to act on behalf of the Palestinians and expressed support for national liberation movements in South Africa. Polisario represents the Sahrawi Democratic Republic in the Organization of African Unity. Of particular significance with respect to the law relating to armed conflict is the fact that, in 1974, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted, by consensus, a resolution inviting national liberation movements recognized by regional intergovernmental organizations to participate without voting rights in the Conference. Ten delegations participated in the Conference as representatives of national liberation movements: the Mozambique Liberation Front (FRELIMO), the People's Movement for the Liberation of Angola (MPLA), the Angola National Liberation Front (FNLA), the African National Congress (ANC), the African National Council of Zimbabwe (ANCZ), the Pan African Congress (PAC), the Zimbabwe African People's Union (ZAPU), SWAPO, the Seychelles People's United Party (SPUP), and the PLO. Over 100 states were represented at the Conference, and provision was made in the Final Act of 1977 for ANC, PLO, PAC and SWAPO to sign it.[18] Moreover, as we have seen, one of the treaties negotiated at the Conference, Geneva Protocol I, has extended the concept of an international armed conflict to include wars of national liberation.[19] International law therefore addresses itself to liberation movements, and in accepting the credentials of particular movements confers on the armed struggles in which they are engaged a status under the law which is denied to other situations of violent conflict.

The I.R.A. claims to be a national liberation movement. It is anxious to distinguish itself from the violent anti-capitalist exploits of groupings such as the Red Army Faction, Action Directe and the Red Brigades in Europe. Whatever the merits or demerits of the violent activities of these groups, they are seen as belonging to a different category to the violent activities of national liberation movements. Rather the I.R.A. analogizes between its struggle in Northern Ireland and the Algerian war of independence and refers, as a present day parallel, to the oppression of the colored inhabitants of South Africa by a racist regime.[20] The parallels are at best partial, but they do clearly tie the I.R.A. claim to legitimacy to a

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18. *See, e.g.*, Espiell, *supra* note 14, para.233. *See also id.* paras.104-5 and 191-233 on the legal personality and recognition of national liberation movements generally.

19. Art.1(4). *See also* 96(3).

20. *See, e.g.*, ADAMS, *supra* note 3, at 5, 28; and CRONIN, *supra* note 7, at 185, 208.

recognized institution of international law, the national liberation movement. But is the I.R.A. in fact such a movement? Has it been recognized as a national liberation movement for the purpose of exercising the right of self-determination of the Irish people?

Despite the many changes in the nature and structure of international law in this century, international law is still essentially a state-based system of law, and the self-perception of a particular group as a national liberation movement is not of itself sufficient to confer that status on it as a matter of international law. Such status can only be conferred by states, acting either individually or collectively. Have either of the two internationally-recognized states most directly concerned, the United Kingdom and Ireland, or any other state or grouping of states accepted the claim of the I.R.A. to be an army of national liberation?

1. United Kingdom

The United Kingdom does not accept the I.R.A. as the legitimate representative of the nationalist minority in Northern Ireland, still less of the whole people of Ireland. Rather the attitude of the British authorities in recent years has been one of straightforward criminalization. The I.R.A. is proscribed by law, and persons convicted of offenses relating to its activities are treated as common criminals.

Government policy towards the I.R.A. had earlier been somewhat less harsh. In the early '70s, those detained for I.R.A.-related activities were given special category status while in detention. Special category prisoners were housed in special compounds, were allowed to wear their own clothes, were not required to work, and were afforded additional privileges, such as extra visits and food parcels. In November 1975, however, this changed. The Secretary of State for Northern Ireland announced the Government's intention to phase out special category status, and this process began on March 1, 1976. No prisoner convicted on or after that date has been accorded special category treatment.[21] Neither 'dirty protests', nor hunger strikes, nor resort to the human rights institutions in Strasbourg, have succeeded in securing the reintroduction of such status.

Even when granted, the status, although signifying an acceptance by the authorities that the I.R.A. prisoners were of a somewhat different species to 'ordinary' criminals, cannot be regarded as tantamount to conferral of prisoner-of-war status or to recognition by the United Kingdom of the I.R.A. as a national liberation movement. As we have seen, Geneva Protocol I brings within the scope of international armed conflicts and therefore of the substantial body of international humanitarian law relating thereto "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exer-

21. *See* McFeeley v. United Kingdom, 20 DECISIONS AND REPORTS OF THE EUR. COMM'N ON HUMAN RIGHTS 44, 48 (1980) (decision of the Eur. Comm'n on Human Rights).

cise of their right of self-determination."[22] At the time of signing this Protocol in 1977, the British Government entered several reservations including one requiring a certain level of intensity of military operations before a situation could be regarded as an armed conflict, and another that an authority which claims to represent a people "be recognized as such by the appropriate intergovernmental organization." No such recognition has been afforded the I.R.A., and the British authorities would deny that the level of intensity of military operations in Northern Ireland is sufficient to constitute a non-international armed conflict (governed by Protocol II), let alone an international armed conflict (governed by Protocol I).[23]

Another indicator of possible recognition by the United Kingdom of a conflict situation in Northern Ireland is the fact that for years the British Government took advantage of Article 15 of the European Convention on Human Rights to derogate from its human rights obligations under that Convention. Article 15 allows derogation in "time of war or other emergency threatening the life of the nation." But while the British authorities would concede that there was an emergency situation in Northern Ireland, they would not concede that there was a war or international armed conflict. Moreover, on August 22, 1984, the United Kingdom withdrew its notice of derogation under the Convention.

2. Ireland

Articles 1-3 of the Irish Constitution assert the right of self-determination of the Irish nation and give expression to the nationalist aspiration to a united Ireland. Article 1 affirms, *inter alia*, the right of the nation to choose its own form of government. Article 2 states that the national territory comprises the whole island of Ireland, its islands and territorial seas. Article 3 provides that, although the Parliament and Government established by the Constitution have the right to exercise jurisdiction over the whole of the national territory, the laws enacted by that Parliament shall, pending the re-integration of the national territory, apply

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22. Art.1(4).

23. The U.K. has not yet ratified Protocol I. Under it, even a member of a national liberation movement will forfeit the right to be regarded as a prisoner-of-war when captured if she/he fails to carry arms openly during each military engagement and during such time as that member is visible to the adversary while engaged in a military deployment preceding the launching of an attack: *see* Art.44(3). The U.K. has also signed (but not yet ratified) Protocol II which applies to non-international armed conflicts between the armed forces of a Contracting Party and "dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol", Art.1(1). It does not apply to situations of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts", Art.1(2). Although the I.R.A. is an organized armed group with a command structure, it is debatable whether, by the level and nature of its military operations, it would attract the application of this Protocol.

only to the 26 counties. No Irish Government post 1922 has accepted that the I.R.A. is entitled to act on behalf of the Irish people. The present Constitution was adopted by referendum in the 26 counties in 1937 in the name of the people of Ireland,[24] and according to Article 3 it is the Parliament and Government established by the Constitution which have the right to exercise jurisdiction over the entire national territory, not any other institution or group.

There is widespread sympathy among the population of the South for the nationalist aim of the I.R.A., but less sympathy for the means it uses to realize this goal. It has often been noted that the Irish are ambivalent in their attitude to violence, but this ambivalence has been less marked in recent years with increasing condemnation not only of indiscriminate bombings in the North but also of targeted attacks on state personnel such as members of the Royal Ulster Constabulary and of the judiciary.[25] After a slight upsurge in popular support following the death of ten hunger strikers in the North in 1981,[26] concern has switched to more mundane matters such as the high level of taxation, the ever increasing rate of unemployment and the continuing drain of emigration. The unity of Ireland by any means, whether violent or non-violent, is no longer high on the list of political priorities in the South.

This hardening of popular opinion in the 1980s towards the use of violence has been mirrored in the courts. Where less than ten years ago a person wanted for I.R.A.-related activities in the North would have successfully resisted extradition on the basis of the political offence exception, the plea is now much more readily rejected by the courts. Instead of being categorized as political, the offence for which the person is wanted is more likely to be described as "revolting and cowardly" and as 'dishonoring the cause espoused by its perpetrator',[27] and the fugitive accordingly extradited to the North. Moreover, the courts now cite the Irish Constitution to condemn organizations such as the I.R.A. as treasonable and hence deny then any recognition under the political offence exception.[28]

In like vein, Irish Governments have taken a succession of measures to suppress and marginalize the I.R.A. In February 1986, the then Government signed the European Convention on the Suppression of Terrorism, and in December of that year introduced legislation into Parliament

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24. 65% of the electorate voted and 57% of those who voted approved the Constitution.

25. There has been particular revulsion at attacks on economic targets, such as building contractors who repair British army barracks.

26. *See* ADAMS, *supra* note 3, at 80-85. Sinn Fein polled a low vote in the February 1987 general election in the Republic and failed to gain a seat.

27. McGlinchey v. Wren [1982] I.R. 154 at 159. *See also* Shannon v. Fanning [1984] I.R. 569, and Quinn v. Wren [1985] I.R. 322.

28. Arts. 15.6 and 39: *see Quinn* [1985] I.R. 322. This case concerned the I.N.L.A., not the I.R.A.

to give effect in Irish law to the Convention. The main targets of this legislation are of course groups such as the I.R.A. and the I.N.L.A. A year earlier, in November 1985, the Government concluded the Anglo-Irish Agreement.[29] This agreement tackles head on, in its very first Article, the question of the status of Northern Ireland. Under it, the British and Irish Governments 'affirm that any change in the status of Northern Ireland will only come about with the consent of a majority of the people of Northern Ireland', "recognize that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland", and "declare that, if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective Parliaments legislation to give effect to that wish."

In concluding this Agreement, the two Governments recognize and attempt to reconcile the two traditions in Northern Ireland, the loyalist and the nationalist, and assert that any change in the status of that territory may only come about by constitutional means, and moreover by means which respect the wishes of the majority of the population of Northern Ireland. This sounds very like a classic implementation of self-determination, except that the people exercising the right are no longer the people of the whole island, still less those of the United Kingdom as a unit, but the people of Northern Ireland. On the one side, the Government of the United Kingdom has formally accepted that a majority of the inhabitants of Northern Ireland may one day wish to be united with the Irish Republic rather than to continue as part of the United Kingdom, and has undertaken to give effect to that wish should it arise. On the other side, the Irish Government has conceded that the nationalist claim to Northern Ireland should not take priority over the wishes of a majority of its inhabitants, and that, although the Irish Government has been given a consultative role under the Agreement with respect to certain matters in Northern Ireland, it is ultimately the people of Northern Ireland who will themselves decide their own future.

3. Other States

It would appear that the only state which today unequivocally recognizes the I.R.A. as waging a war of national liberation in Northern Ireland against an occupying colonial power is Libya. While statesmen of other countries have from time to time expressed support for the nationalist cause, there has been no endorsement of violence in pursuit of this cause, much less acceptance that the I.R.A. is the legitimate representative of the Irish people for the purpose of securing Irish unity.

The situation in Northern Ireland has over the years come before

29. The present Prime Minister of Ireland, after initially rejecting the Agreement while in opposition, has indicated that his Government will in fact honor it: *see* The Irish Times, March 17 and 18, 1987.

many international fora including the U.N. Human Rights Commission and the European Court of Human Rights, but concern about human rights violations is one thing, categorization of the situation in which they occur as an international armed conflict is another, and it has never been accepted by any intergovernmental organization that there is currently being waged in Northern Ireland a war of national liberation. In 1969, when violence escalated in Northern Ireland, the Irish Government attempted to bring the situation before the U.N. and to persuade the British Government to allow a U.N. peacekeeping force into Northern Ireland. The U.K. rejected this suggestion, and when it also managed to persuade the U.S.A. that the situation was an internal civil rights matter, the prospect of U.N. action evaporated.[30] Furthermore, as we have seen, one of the fora in which the question of the status of specific organizations as national liberation movements was addressed was the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, and the I.R.A. was not among the movements invited to participate in the Conference.

IV. CONCLUDING REMARKS

Although the argument that Northern Ireland is a British colony appears at first sight plausible given the history of Ireland, on closer examination, it becomes clear that it does not mesh entirely with reality. As far as the vast majority of states in the world today are concerned, Ireland was decolonized in 1922 with the establishment of the Irish Free State, or at some time in the following decades when the new state began to assert its independence of Britain. Northern Ireland is today legally part of the United Kingdom, a status most recently confirmed in the Anglo-Irish Agreement by the government with the greatest interest in the territory and its inhabitants apart from Britain, that is, the Irish Government.

But even if it be accepted that Northern Ireland is a lingering outpost of a once great empire and represents "unfinished business",[31] the claim of the I.R.A. to be exercising the right of self-determination of the Irish people is weak and has not been generally endorsed by the international community of states. Nor can it claim to represent the people of Northern Ireland, the majority of whom have for the last 65 years made it clear that they want no part of Irish unity. That leaves the nationalist minority in Northern Ireland, but international law has not yet accepted that a minority may constitute a people for the purpose of exercising the right of self-determination.

To reject as not well-founded in international law the claim of the I.R.A. to be a national liberation movement is not to denigrate the courage of many of its members or to question the sincerity with which they

30. *See* COOGAN, *supra* note 3, at 426; and BOWYER BELL, *supra* note 8, at 364.

31. ADAMS, *supra* note 3, at 38.

hold this view. The fact is that they are not 'ordinary' criminals, and no amount of terrorist labelling can make them so. Both the British and the Irish Governments should recognize this. Some recognition may be afforded the ideological motivation of members of the I.R.A. and some distinction drawn between them and 'ordinary' criminals, without conceding that they are waging a war of national liberation and without conferring on them the status of combatants or prisoners-of-war when detained. Thus, the authorities in Northern Ireland could allow them certain privileges denied to other prisoners, and the Irish authorities could retain the political offence exception to extradition for acts which, if they had occurred in a situation of recognized armed conflict, would be regarded as legitimate. In this latter connection, it is my view that the European Convention on the Suppression of Terrorism is too crude an instrument in that it provides for extradition for certain offenses irrespective of motivation and of the context and circumstances in which the offence occurs. To kill an 'enemy' soldier in an imagined war of national liberation is not the same thing as to plant a bomb on a crowded bus. In an actual war or armed conflict, the former killing may be legitimate, the latter is prohibited.

The I.R.A. of 1987 is not the same organization as the I.R.A. (Irish Volunteers) of 1916. It is a time-warp to view the I.R.A. today as an army of national liberation. Much water has passed under the bridge since 1916. A new state with democratic institutions has come into existence in the greater part of the island, and even in the North some democratic institutions survive, however inadequate they may be.

The way forward in Northern Ireland with its horrendous social problems and imbedded religious bigotry is not through the gun. Significant social reform is needed not only to end discrimination in such matters as jobs and housing, but to secure to each member of the community irrespective of religious affiliation, political beliefs or social class, a life of dignity. The greatest problem of all is clearly sectarianism, and one of the greatest perpetrators of sectarianism is the system of segregated education at primary and secondary levels— segregation not on the basis of color or sex, but of religion. Integrated schooling must be seen as a priority. Such radical change would be resisted by powerful vested interests, but where there's a will, there's a way. Ironically, the introduction of such reform would in all probability be fundamentally undemocratic in that it would have to be introduced against the wishes of the majority of the population on both sides of the sectarian divide. Without such reform, however, little will change. Bigotry will continue to stalk the land claiming victims and, as in the past, the seething cauldron will periodically bubble over in violent fashion. There must be a better way.

Management Agreements in Dutch Agricultural Law: The Contractual Integration of Agriculture and Conservation

MARGARET ROSSO GROSSMAN*

I. INTRODUCTION

The increasing vulnerability of the world's finite land resources, and especially of the world's agricultural land, has led to implementation of a number of programs designed to prevent conversion of land from agricultural to nonagricultural uses, to protect especially fragile land from gradual loss of productivity through erosion and other causes, and to retain the irreplaceable nature and landscape values that inhere in some land used for farming. These programs vary from nation to nation (and even between states or other governmental subdivisions within a nation), depending on the amount of productive agricultural land and the severity of threats to its retention, attitudes of citizens and governmental officials about the land, and the mechanisms offered by the legal system to protect and regulate use of that land.

A. *Agricultural Land in The Netherlands*

One nation that has adapted comprehensive legal methods to protect its land resources is The Netherlands. Agricultural land is crucial for The Netherlands, which has an intensive agricultural industry that produces high-quality products for consumption at home and abroad. A small nation, with a total area of 4.15 million hectares,[1] The Netherlands has 2.02 million hectares of cultivated land, used for arable farming, grassland, horticulture, and other agricultural purposes.[2] Although farmers make up

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1. The Netherlands is about the size of the combined states of Massachusets and Connecticut. Its area includes about 34,000 square kilometers of land and 7000 square kilometers of water areas (lakes and inland sea branches). Each square kilometer is equal to 100 hectares. van Lier, *Rural Land Uses in the Netherlands*, 51 EKISTICS 4, 4 (1984).

2. MINISTRY OF AGRICULTURE AND FISHERIES, DUTCH AGRICULTURE in FACTS AND FIGURES 3 (1986) (1985 statistics)[hereinafter FACTS AND FIGURES].

only a small proportion of the inhabitants of Holland,[3] agriculture contributes significantly to the economy, and agricultural products make up a relatively large percentage of annual exports.[4]

Yet, at the same time, Holland's extreme population density has led to increased pressure on the agricultural land. Interests other than agriculture have demanded a share of rural areas. Urbanization, industrialization, and infrastructural developments have intruded on the countryside. Conversion of agricultural land to other purposes, in The Netherlands as in the United States,[5] has meant that the amount of land under cultivation has dwindled.[6] In addition, in recent years special values inherent in the countryside have become important to particular sectors of the Dutch population. For example, increased demands for outdoor recreation have required dedication of rural land to satisfy the recreational needs of those living in cities and towns. Also, and most important in the context of this article, an enhanced realization of the importance of protecting valuable natural resources and landscape characteristics has made new demands on agricultural land, particularly on the management of that land.

In many instances, optimal use of land requires that it satisfy several interests of society simultaneously, when the land-use functions demanded to fulfill those interests are compatible. Multiple uses of land are particularly appropriate in rural areas, and because the majority of rural land in Holland is in agricultural use, this possibility affects agricultural land in particular. In The Netherlands, a distinction is often made between situations involving integration and separation of land uses.[7] Law and policy concerning land use recognize this distinction. Following the motto "integration where possible, separation where necessary", physical planning policy strives to maintain a diversity of land uses, along with

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3. Agriculture, involving 270,000 workers, makes up about 6 percent of the active work force. *Id.* at 3.

4. *Id.* at 4, 14, 19.

5. Much has been written concerning the loss of agricultural land in the United States. *See, e.g.*, GAO, PRESERVING AMERICA'S FARMLAND—A GOAL THE FEDERAL GOVERNMENT SHOULD SUPPORT, Rep. No. B-114833 (1979); NATIONAL AGRICULTURAL LANDS STUDY, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS (1981).

6. Presently about 5,000 hectares per year are lost, a significant amount in light of Holland's small size. A. CRIJNS, THE REGULATIVE PHASE OF LAND DEVELOPMENT, at 1 (Landinrichtingsdienst Information Paper 7 (1986)). At the end of the 1960s and during the early 1970s, the annual loss was about 10,000 hectares.

7. A distinction is sometimes made between functional and spatial integration (*verweving*). Functional integration involves a situation in which the manager of an area focuses management on two or more different societal goals for example, a meadow with meadowbirds. This normally occurs within a relatively small scale—an area managed as a unit. Spatial integration is relevant when an area fulfills different functions; management of the area may be in one hand or several (for example, specially managed banks of trees (*houtwallen*) in an agrarian region). See Dauvellier, *Achtergronden en perspectieven van het beleid voor de landelijke gebieden*, in VERWEVING IN HET LANDELIJK GEBIED 5-6, Rijksplanologische Dienst, publicatie 85-4 (1985).

coherence of spatial use in the rural areas.[8]

The issue of integration or separation of land uses has particular relevance for agricultural land with special landscape or natural values. Indeed, in The Netherlands there are 500,000 to 700,000 hectares of agricultural land where natural-scientific or landscape values exist and where integration is desirable.[9] In these areas, a direct connection often exists between valuable natural conditions and relatively poor farming situations. Such natural conditions as high water levels, for example, interfere with efficient farming, but provide the kind of environment in which valuable birds breed and rare flora thrives.

Dutch law offers several instruments that can help to preserve natural values on agricultural land. In the context of rather complicated and stringent physical planning that strictly regulates development, the municipal land-use plan offers the opportunity to preserve some natural elements by requiring permits before certain damaging activities can be carried out in agricultural or natural areas.[10] It can require a type of passive management, but generally is not effective in limiting the intensity of the land use that can threaten natural elements.[11] Another legal instrument, land development—consolidation or reallocation of ownership—also has the potential to contribute to the preservation of natural values, as it restructures entire areas of the countryside to provide the most effective interrelationship of agricultural, natural, and other land uses.[12]

A third instrument is the program of specialized agricultural land management often referred to as *Relatienota* policy, which is the subject of this article. Although the *Relatienota* operates on a relatively small scale, it has demonstrated its potential to integrate agricultural land use with the important and vulnerable nature and landscape values that exist in some areas of The Netherlands. By compensating farmers for activities that maintain existing natural conditions and for the adaptations in their farm businesses that those activities require, this instrument provides the incentive needed for extraordinary efforts to protect environments for valuable plant and animal species. Indeed, it offers some of the Dutch farmers, whose land is characterized by inefficient production circum-

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8. RIJKSPLANOLOGISCHE DIENST, MINISTERIE VAN VOLKSHUISVESTING, RUIMTELIJKE ORDENING EN MILIEUBEHEER, RUIMTELIJKE PERSPECTIEVEN, OP WEG NAAR DE 4E NOTA OVER DE RUIMTELIKJE ORDENING 116 (1986).

9. Dauvellier, *supra* note 7, at 14; Brussaard & van Wijmen, *Natuur en landbouw. Enkele juridisch-bestuurlijke beschouwingen over scheiding en verweving*, 46 AGRARISCH RECHT 157, 162 (1986).

10. *See infra* text accompanying notes 232-251 for a discussion of physical planning.

11. This lack of effectiveness is due in part to practical considerations. In rural areas the elected municipal councils charged with enacting land-use plans include farmers, who are reluctant to restrict the use of agricultural land. Even when the provincial deputed states desire restrictions, the councils often do not implement the restrictions fully.

12. See generally Grossman & Brussaard, *The Land Shuffle: Reallocation of Agricultural Land Under the Land Development Law in the Netherlands* 18 CAL. W. INT'L L.J. 209 (1988).

stances, the opportunity to make nature conservation one of the products of their farms. At the same time, it recognizes that integration of agricultural and natural functions does not always serve the best interests of either function. Thus, the policy also provides for establishment of some areas in which farming is terminated in favor of active nature preservation efforts.

Relatienota policy involves the use of private law contracts with individual farmers, as well as government purchase and management of vulnerable land. The policy has used these contracts, referred to as management agreements (*beheersovereenkomsten*) effectively to achieve goals important to Dutch society. This article explores the background and development of this important policy in adapting agricultural and nature conservation practices, and analyzes the process of implementation of the policy in vulnerable regions of The Netherlands. In addition, it considers the contracts entered between farmers and the government, and focuses on difficulties in implementation of *Relatienota* goals. In so doing, the article sheds light on a fascinating aspect of Dutch agrarian law, which has demonstrated potential in accommodating the often-conflicting interests of agriculture and nature.

B. Management Agreements in Perspective

A consideration of the structure and efficacy of Dutch *Relatienota* policy and the management agreements used to implement that policy has potential significance beyond the borders of The Netherlands. Holland is only one of several nations with some type of legally authorized program designed to accommodate agricultural practices to the requirements of nature and landscape. Management agreements are available, for example, in several European Community member states: France, the United Kingdom, the Federal Republic of Germany, and Denmark.[13] Although the goals of the programs in these states are generally similar, variations in implementation exist; these variations can be explained in part by differences in the legal and administrative frameworks that support the programs.[14]

The programs share some general characteristics. They usually are of relatively recent origin and are significant because they provide a necessary supplement to other agricultural and environmental policy instruments. Management agreements can offer flexible protection in areas where stringent land-use regulation or government acquisition and management is impossible. Typically, these agreements operate only in specif-

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13. COMMISSIONS OF THE EUROPEAN COMMUNITIES, AGRICULTURE AND ENVIRONMENT: MANAGEMENT AGREEMENTS IN FOUR COUNTRIES OF THE EUROPEAN COMMUNITIES, at vii (EUR 10783 (1986)) [hereinafter COMMISSION OF THE EUROPEAN COMMUNITIES].

14. For information on the legal bases of management agreements in France, the Federal Republic of Germany, and the United Kingdom, *see id.* at 16-18. Concerning the United Kingdom, *see also* Leonard, *Management Agreements: A Tool for Conservation*, 33 J. AGRIC. ECON. 351 (1982).

ically designated land areas; the kind of site actually eligible for protection varies from state to state.[15] For comparable types of sites, however, the practical management requirements of the various schemes are somewhat similar.[16] Dutch management agreements share these characteristics with programs in other EC states; the Dutch program is unique and perhaps more efficient, because a national agency is the sole authority with power to enter agreements with landowners.[17] In other nations, several different agencies—often at national, regional, or local levels—have the authority to negotiate and enter agreements.[18]

As this discussion has indicated, European Community member states have experienced a rapid growth in opportunities to use management agreements to adapt farming practices to wildlife and landscape conservation goals. Interest exists in the possibility of implementing a system of management agreements within the EC. Such a scheme, involving EC financial contributions for qualifying, but optional, national programs, could promote environmentally sensitive agricultural management practices, and thereby conserve vulnerable rural resources. Moreover, with careful design it could help to provide a framework to unify the management agreement schemes now being developed in EC member states.[19] A workable program would require participating farmers to obligate themselves to fulfill active management practices in exchange for realistically high payments made on a flat-rate basis, and reflecting both the income potential of farmers in the sensitive area and the obligations imposed by the agreement.[20] The differences in conditions in the member states will require a flexible system, with room for local variation.[21]

An EC management agreement program is not without problems. Cash payments per hectare are convenient, but may not be accepted uniformly by farmers or by member states fearing either the financial commitment or the precedent of payment for environmental conservation. Another difficulty concerns identification of the areas that would qualify for participation. Logically, the scheme should apply to environmentally sensitive areas that are farmed; budgetary realities would require a limit within each state of a percentage of the agricultural land base.[22]

Despite the complications inherent in designing and implementing a management agreement scheme adaptable to the different EC member states, the prospect of protection of vulnerable agricultural landscapes

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15. COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 13, at 18-19.

16. *Id.* at 36.

17. *Id.* at 18-19. Presently, the Netherlands is the only nation in which management agreements are connected with the implementation of the European Community Less Favored Areas Directive. *See infra* text accompanying notes 194-202.

18. *Id.* at 18.

19. *Id.* at 38-39.

20. *Id.* at 40-41.

21. *Id.* at 41.

22. *Id.* at 39-40.

and habitats makes such a program desirable. The Netherlands' management agreement program, thoughtfully designed and carefully implemented, offers an optimistic preview of the viability of an EC scheme. Moreover, its design may well serve as a starting point for consideration of an EC-wide system of management agreements.

II. *RELATIENOTA* POLICY

During the 1970s, the attention of many in The Netherlands turned increasingly to the care of valuable cultural landscapes and the position of agriculture in those areas. Nature and landscape values in vulnerable areas were diminishing rapidly, and agriculture threatened to deteriorate. The importance of intensive attention to these areas was articulated in a physical planning document, the *Oriënteringsnota*, which first appeared in 1973.[23] This document acknowledged the vulnerability of the existing nature areas and cultural landscapes, and articulated a number of measures appropriate for protecting these valuable landscapes. The measures taken included creation of a program directed at landscape management performed by agricultural land users, and establishment of reserves in situations where continued agricultural production was inconsistent with a management directed toward nature and landscape.[24]

The rather broadly-sketched policy of the *Oriënteringsnota* began to take shape in another policy document, the so-called *Relatienota* or Relationship Report, which appeared in 1975.[25] This report, focusing on the relationship of agriculture to nature and landscape conservation,[26] reviewed recent developments in agricultural land use from the points of view of both agriculture and conservation, and established a policy framework for coordination of conflicting interests in particularly vulnerable areas. It presented a number of policy resolutions and measures intended to protect the most valuable and sensitive parts of the cultural landscape from further damage and to enable the farmer to carry out responsible nature protection in the framework of farm management.[27]

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23. The final version appeared in 1979. Derde nota over de ruimtelijke ordening in Nederland—Deel 1e: Oriënteringsnota ruimtelijke ordening (Tekst van de na parlementaire behandeling vastgestelde nota) (1979) [hereinafter Oriënteringsnota].

24. *Id.* at 63. Other measures suggested were the provision of protection through the land use planning system and the development of forms of land development and agricultural management especially appropriate for areas requiring landscape protection. *See* Nota betreffende de relatie tussen landbouw en natuur- en landschapsbehoud, at 29. Tweede Kamer der Staten Generaal, zitting 1974-1975, 13 285, Nos. 1-2 (1975) [hereinafter Relatienota]. *See also* Wind, *Beheersregeling in de praktijk*, 42 AGRARISCH RECHT 105, 105 (1982).

25. Relatienota, *supra* note 24. For some general information about the Relationship Report in English, *see* Fornier, *Managing the Natural Environment in Agricultural Areas*, 11 PLANNING AND DEVELOPMENT IN THE NETHERLANDS 161 (1979).

26. Its subtitle is "Common starting points for the policy concerning agrarian cultural landscapes valuable from the viewpoint of nature and landscape conservation" (Gemeenschappelijke uitgangspunten voor het beleid inzake de uit een oogpunt van natuur- en landschapsbehoud waardevolle agrarische cultuurlandschappen).

27. Relatienota, *supra* note 24, at 2.

A. *Agricultural Land Use and Nature Protection: Emerging Conflicts*

1. *Developments in Agriculture*

General prosperity in Holland, leading to an increase in real wages, helped to stimulate the development of labor-saving methods for agriculture. The economic situation required use of those methods to increase production and to keep up with higher incomes in other sectors of society.[28] Cultural-technical improvements and intensification of land use, among other factors, made possible a significant increase in worker productivity. But, at the same time, slow growth of markets for agricultural products and a diminished availability of agricultural ground led to decreasing work opportunities in agriculture. Developments in agriculture in the decades before publication of the *Relatienota* were characterized by a noticeable decrease in the number of workers, a resulting decline in the number of farms, an enlargement in scale of surviving farms and tillage units, and increasing specialization.[29]

The *Relatienota* recognized that significant improvements in productivity can occur from a number of directions: replacement of labor with capital (mechanization); increasing use of "nonfactor inputs" such as artificial fertilizers and feed concentrates; increased animal and crop productivity; improvement of production mechanisms (better machines) and farm organization; or improvement in external production circumstances such as water management, parcel size and shape.[30] Each of these possibilities, however, has the potential to influence the natural environment and landscape.

Particular aspects of agricultural development are especially threatening to nature and landscape values. For example, redevelopment in agricultural regions for improvement in access to fields of more workable size and shape (*landinrichting*) usually interferes with natural conditions. Water management directed toward agricultural productivity also threatens some natural environments, as do intensive fertilization and use of concentrates.[31]

At the same time, however, protection of nature can threaten the viability of agriculture. Within certain limits, care of nature and development of agriculture can operate compatibly, allowing the farmer to link his economic function with protection of the environment in which he works. Some nature protection requirements, however, cannot be met without economic disadvantage to farm businesses. The farmer who is required to refrain from making infrastructural improvements or to use less fertilizer and pesticides, for example, will enjoy a less profitable business.

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28. The *Relatienota* suggested, however, that maintenance of income in agriculture can also take place by transition to a different type of business through expanding the production tasks not connected to the ground. Relatienota, *supra* note 24, at 3.

29. *Id.* at 3.

30. *Id.* at 3, 6.

31. *Id.* at 5.

That farmer will be unable to improve production. He will face higher (or at least not lower) costs for field work and transport, as well as increased expenses for care of animals.[32]

Such decreases in farm income are significant even beyond their effect on the individual farmer. The farmer's income is important both for providing the family's livelihood and for financing continued investment in the farm business. When requirements of nature conservation, or other factors often beyond the individual farmer's control, force a decline in income so that investment is impossible, farms eventually decline. Because agriculture is important to the national economy, both for production of food and raw materials and as a source of work opportunities, other sectors dependent on farming also suffer from farm deterioration. Moreover, the socio-economic and social structure of entire agrarian regions can be affected by incursions in agricultural production.[33]

2. Developments in Conservation

Society in The Netherlands has assigned an increasing value to types of human needs that cannot be expressed in terms of money and property. This trend is reflected, in part, in the more concentrated attention paid to nature and landscape and to its preservation in light of threats from agriculture and other sources, and also in criticism of activities that endanger the natural environment. Rapid changes in the countryside have made such activities pervasive. Natural areas have faced increasing pressure from developments accompanying the prosperity, increased population density, and greater mobility of recent decades. Road building, industrialization, expansion of living areas, and recreational provisions have affected the character and atmosphere of the countryside, both reducing the size of natural areas and threatening the quality of nature and landscape.[34]

Changes in traditional uses of agricultural land also threaten the environment. Historically-evolved farming practices have helped to shape the Dutch landscape in rural areas. Different rural ecosystems developed in part through application of stable and permanent farming practices, which varied from area to area. The ecosystems thus were dependent on historical types of agricultural land use, which resulted in landscapes characterized by diversity and variety. Changes and intensification of land use threaten these valuable landscapes.[35]

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32. This loss in income can be quantified accurately only in specific cases, but the *Relatienota* makes some general observations on the subject. *Id.* at 6-10.

33. *Id.* at 11-12.

34. *Id.* at 13-14.

35. *Id.* at 14. Of course, these changes are not unique to Holland. *See, e.g.*, COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 13, at 15.

> The enormous changes which have taken place in European agriculture over the last three to four decades have had a profound effect on the rural environment. Many valued landscapes and wildlife habitats depend on a par-

Agriculture, now focused on enlargement of scale, mechanization, intensification, and specialization, is directed toward increased productivity per worker and per surface unit. In its modernized form, agriculture now often threatens, rather than creates and maintains, valuable cultural landscapes. Species of plants and animals, especially those that require traditional agricultural practices to provide suitable habitats, are disappearing, and small-scale landscapes are threatened.

According to the *Relatienota*, the landscape must be viewed as a source of cultural-historical and natural-historical information. Both types of information are vulnerable to loss through developments in land use. Individual and collective activities play a role in the process of loss.[36] Natural elements in the landscape are threatened, for example, by activities like water management, land reclamation, use of chemical pesticides or herbicides, and development to improve access to the countryside. Interference with the natural terrain, through change in parcel size and shape, often displaces elements that have existed for centuries. Other activities, such as changes in the water level or the use of chemicals, lead to a decline in species of plants and animals.[37]

But developments that modernize agriculture also threaten valuable cultural-historical elements, like traditional structure of farm parcels, with their ancient earth walls and planted hedges, and traditional road and watercourse patterns. Historically valuable farm buildings are lost through modernization or conversion to nonagricultural use, and new buildings often destroy the cultural-historical unity of landscape and character of agricultural construction in the region.[38]

B. Response: Relatienota Policy

In light of these developments, policy directions espoused in the *Relatienota* take their shape from the articulation of the problem:

> The problematic nature of these landscapes is that on the one side as a consequence of the developments of agriculture in its economic function (production of food and raw materials) a process of harmful effects on nature and landscape takes place, while on the other side it is important that agriculture continues to fulfill a management function in such areas.[39]

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ticular form of farm management and therefore are vulnerable to change. One form of change is the abandonment of traditional techniques, or even abandonment of farming altogether, another is the removal of existing features, such as hedges, another is the adoption of new techniques which are incompatible with the conservation interest of a site, such as the use of certain herbicides.

See also id. at 5.

36. Relatienota, *supra* note 24, at 14.

37. *Id.* at 15-18.

38. *Id.* at 18-20.

39. *Id.* Brief van de Staatssecretaris van Cultuur, Recreatie en Maatschappelijk Werk, at 1.

As the *Relatienota* made clear, existing legislative schemes offered only partial solutions to the conflicts between agriculture and nature conservation.[40] A number of reconsiderations and possible legislative amendments appeared desirable.[41]

1. Financial Compensation

The *Relatienota* policy, which led to establishment of the instrument called the *beheersovereenkomst* (management agreement), recognized that for generations the farmer has functioned as a protector of nature and landscape. Though modern agricultural practices often threaten, rather than protect, natural values, continued agricultural use remains an essential characteristic of important cultural landscapes. These vulnerable areas require an agricultural management directed towards goals of nature protection. Because such management is not always consistent with the production goals of agriculture, the nature protection function of the farmer must receive financial recognition.[42] In recommending an administrative system for such recognition, the *Relatienota* recognized two important considerations: that continuation of agricultural activity as such forms an essential part of valuable agrarian cultural landscapes, and that the producing and management functions of farmers are mutually dependent—strengthening of the management function results in declining production, and vice versa.[43] Moreover, the level of compensation to the farmer must be related clearly to the required management. At the same time, however, the payment plus production income must offer the farmer an adequate income.[44]

The *Relatienota* suggested three possible types of compensation for the farmer: payment for performance of clearly described maintenance and management activities; payment in connection with permanent natural handicaps, on the basis of the less-favored areas directive (the so-called mountain-farmer rules) of the European Economic Community;[45] and compensation for adaptations in the farm business, such as underuse of facilities, made necessary by management tailored to nature and landscape interests.[46] More detailed application of these general suggestions

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40. *Id.* at 20-28. The *Relatienota* considered the potential of physical planning law, as well as other legislation. No law could provide the desired imposition of land-use conditions directed to nature conservation along with the necessary financial incentive to farmers.

41. *Id.* at 33-35, 39-40.

42. *Id.* at 30.

43. *Id.* at 31.

44. *Id.* at 31.

45. This program is regulated by Directive 75/268/EEC, and implemented in The Netherlands by the Beschikking bijdragen probleemgebieden, Nr. J. 7398 (Stcrt. 251)(December 22, 1982). For further information about the operation of this program in connection with *Relatienota* policy, *see infra* text accompanying notes 194-202.

46. Relatienota, *supra* note 24, at 31. In practice, this third element is not paid separately. Instead, it is part of the total management compensation and can only be awarded in connection with management activities.

was the task of the government.[47] The possibility of compensation should be available to all farms that demonstrate need for management directed to interests of nature protection.[48]

When a farmer works in a vulnerable natural area and receives compensation for management of nature and landscape, his enterprise ideally should have the same income possibilities as farms with similar external production circumstances,[49] but without restrictions on management. Thus, the farmer's compensation must ensure maintenance of an adequate income. Nonetheless, the compensation offered to the farmer and necessary for continuation of the business must also bear reasonable relation to the economic importance of the continuation of the agricultural use of the protected area. Payments to the farmer cannot be more than the value that his management activities contribute to society. Otherwise, as the *Relatienota* makes clear, it may be more appropriate to set the area aside as a reserve, rather than to keep it in active, though extensive, agricultural use.[50]

2. *Special Protection: Management Areas and Reserves*

Maintenance of nature and landscape values as envisioned by the *Relatienota*, can be achieved in part through specialized management tasks undertaken by farmers. This can occur in several types of situations. In some areas, the values to be protected are geographically localized; elements like hedges, trees or groups of trees, ditches or pools are prevalent. Depending on their location and their density, these can interfere with development of the farm. To protect such natural elements, the *Relatienota* suggests the use of private contracts called *onderhoudsovereenkomsten* (maintenance agreements), under which the landowner would agree to preserve the natural amenity in exchange for payment for the necessary work and a subsidy for the burden created by the protected element.[51]

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47. *Id.* at 32.

48. *Id.* at 31.

49. External production circumstances are water management, accessibility, allotment, and parceling or arrangement of farmland parcels.

50. Relatienota, *supra* note 24, at 32.

51. *Id.* at 36. The maintenance agreement (*onderhoudsovereenkomst)* is not the major focus of this article. Maintenance agreements are carried out under authorization of the Natuurbeschermingswet, 1967 Stb. 572, Ned. Staats. 165 (1981). The program is governed currently by the Beschikking onderhoudsovereenkomsten landschapselementen, 1977 Stcrt. 182, as amended, *reprinted* in Ned. Staats. 165, at 65-71, and the Beschikking aanwijzing landschapselementen, 1981 Stcrt. 20, as amended, Ned. Staats. 165, at 71-73. The former *beschikking* regulates the formation of contracts and the latter, the areas and landscape elements that can be protected under the contracts. Although these vary from region to region, they include various types of hedges and earthen walls, small natural areas, and woods. Both of the regulatory documents may be amended in the future.

A landowner or user who agrees to preserve an important landscape element signs a formal maintenance agreement contract with a representative of the government. In that contract the landowner or user promises, for a renewable period of six years, to maintain a

In other areas, vulnerable natural values are not separately identifiable elements, but are instead environments that were formed through agricultural exploitation of the area; these include meadow-bird areas or botanically significant grasslands. Agriculturally used buffer zones around nature areas are sometimes also vulnerable. For these areas, in which agriculturally exploited ground itself is the object of protection, the *Relatienota* envisions *beheersovereenkomsten* (management agreements). Under these ordinary private law contracts, the agriculturalist owner or user of the ground would obligate himself to tailor agricultural management to perform certain actions under circumstances, in a form and on a schedule determined to be optimal from the viewpoint of nature and landscape management.

Several distinct types of duties would form part of these contracts. The farmer would obligate himself to perform the needed maintenance of valuable natural amenities. He would also promise to direct his farm management to realize the goals of nature and landscape. Protection of nature values might include refraining from making improvements in external production circumstances (changes in the natural environment) that might otherwise be desirable for optimum agricultural efficiency. In exchange for performing these obligations, financial compensation (the management income) would be available.[52]

Private contracts to ensure management of sensitive areas pose disadvantages. Such contracts are normally of limited duration, and they are often difficult to enforce. Moreover, as private contracts, they have limited effect against those not party to the agreements. Nonetheless, such contracts are one of the few existing means that can both counteract the degradation of the natural landscape and compensate land users for their involvement in landscape management.[53]

For some extremely vulnerable areas, however, the actions necessary to meet the goals of nature protection place such intrusive demands on farm management that a profitable farm business is no longer possible. In these instances, often situations involving natural values of particularly high quality and special vulnerability, management agreements cannot ultimately succeed. While private contracts may be desirable on a temporary basis, the necessary management can be achieved only by purchase of these lands and conveyance to a nature protection agency.[54] Management can then be directed toward maintenance and restoration of the na-

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specific landscape element or elements and to avoid activities that will damage or destroy those elements. As compensation, the contracting individual will receive an annual payment from the government. The payment is calculated on the basis of the length or surface area of the landscape element and reflects the cost, in labor and materials, of maintenance. Successors to the land in title or use have the right to continue the agreement, if they wish.

52. Relatienota, *supra* note 24, at 36.

53. *Id.* at 26. The document recognizes that, psychologically and economically, private contracts offer a limited contribution; instead public law rules may be more desirable.

54. *Id.* at 37-38.

ture values, as well as increase in quality of the natural environment.

Although the creation of reserves should assume high priority, it raises difficult issues of selection, acquisition, and management. Land can only be identified as a reserve after careful consideration of the nature and landscape values, as well as the planning structure of the region and the agrarian situation. Significantly, the success of even carefully chosen reserves depends in large part on the possibilities available for purchasing these valuable areas from their owners. When purchase on the open land market is required, reserves may not always be successful. Limited mobility of agricultural land in a large number of regions, and the often fragmented ownership situations in vulnerable areas may pose difficulties for purchase on the open market.[55]

3. Implementation of Policy

A society that attaches high values to nature and landscape must expect to bear some financial cost in protecting those values. With natural landscapes in which agriculture forms an important part of the social and geographical structure, protection of nature values often requires an agricultural management that, from an economic point of view, is far from optimal. Thus, payment is necessary both to maintain the living standards of the agrarian population and to ensure the continued existence of agriculture in the area.[56] Design of a program to accommodate the interests of both agriculture and nature and landscape protection must, according to the *Relatienota*, involve cooperation with the agricultural population. Management functions can be designed only in consultation with the farmers who, in principle, are willing to fulfill the desired management conditions.[57]

The policy direction established in the 1975 *Relatienota* has been developed in the ensuing years. In the Rural Areas Report (*Nota landelijke gebieden*), a planning document that first appeared in 1977,[58] the government specified that a maximum of 200,000 hectares (approximately one-tenth of the agricultural land in The Netherlands) should be protected through application of the *Relatienota* policy. This maximum would include both reserves and management areas, and would be implemented gradually, depending on the urgency of the need for conservation and the availability of financial means. The first stage would involve approximately 100,000 hectares.[59]

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55. *Id.* at 26-27. The *Relatienota* suggests that, while voluntary sale is one method, it is more desirable to have a mechanism for compulsory purchase of such lands. *Id.* at 38.

56. *Id.* at 44.

57. *Id.* at 45.

58. Derda nota over de ruimtelijke ordening. Nota landelijke gebieden. Deel 3E: text van de naar aanleiding van de parlementaire behandeling vastgestelde planologische kernbeslissing. Tweede Kamer der Staten-Generaal, Zitting 1983-1984, 14 392, nr. 46 (1983).

59. *Id.* at 23. This recommendation is included in the *Structuurschets voor de landelijke gebieden 1983*, which forms part of the *Nota landelijke gebieden.*

Further documents have implemented this policy. Most important among these is the *Beschikking beheersovereenkomsten* (decree on management agreements),[60] which will be considered below.[61]

C. *Relatienota Infrastructure*

Implementation of the *Relatienota* policy involves close cooperation between governmental entities, nature protection organizations, and private landowners. Several governmental entities established by law have been, and continue to be, involved most closely in the process. An understanding of these entities and their interrelationship is essential to a complete picture of the *Relatienota* policy. In essence, one entity makes policy decisions; another provides personnel to implement these decisions; and one serves as the legal representative in transactions involving land.

1. *Bureau Beheer Landbouwgronden*

The government of The Netherlands sponsors a number of programs involving agricultural land. Among these are land development, creation of wooded areas, maintenance of buffer zones around large cities and in the vulnerable and heavily-populated Western section (*Randstad*) of the country, development of recreation areas, and creation of nature reserves.[62] These programs often require the purchase of agricultural ground on the open market or through special legal provisions, temporary management of the purchased land, and, in many instances, reconveyance of the land to new owners.

The *Bureau Beheer Landbouwgronden* (Bureau for Agricultural Land Management) is the entity authorized to carry out these transactions on behalf of the government. The Bureau was established by the *Wet agrarisch grondverkeer* (law on the transfer of agricultural land) enacted in 1981.[63] It has the status of a juristic person, capable of entering legally binding contracts,[64] and is represented in each province through a

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60. *See infra*, note 71. Beschikking van de Staatssecretaris van Landbouw en Visserij van 24 December 1982, Nr. J. 7417 (as amended).

61. *See infra* text accompanying notes 111-193.

62. DIRECTIE BEHEER LANDBOUWGRONDEN, MINISTERIE VAN LANDBOUW EN VISSERIJ, BUREAU BEHEER LANDBOUWGRONDEN at 2-6 (1985).

63. Wet agrarisch grondverkeer, Ned. Staats. 175 (1984). Enacted in response to fluctuation in land prices, the law establishes a legal framework to ensure a balanced price development for agricultural lands and nature areas. It creates organizations to supervise and act as representative in several programs involving agricultural land, and it gives a legal framework to a land bank system. The law becomes applicable at a time specified by the government, and that time can be different for individual articles. *Id.* art. 70, lid 2. *See* Ned. Staats. 175, at 77. The regulatory system focused on ground prices has not yet been implemented. At the time the law was published, ground prices were steady and the provisions were not necessary. Although prices have since begun to increase, political considerations have mitigated against regulation of land prices.

64. *Id.* art. 28. *See* Joustra, *Naar een Beheerswet voor landbouwgronden*, 42 AGRARISCH RECHT 120, 122 (1982). The Bureau is the successor of the *Stichting Beheer Landbouw-*

provincial bureau. Tasks of the Bureau are specified by ministerial regulation.[65] These tasks involve the acquisition, temporary management, or transfer of real property, as required to carry out specific laws and regulations.[66] Land acquisition for implementation of the *Relatienota* program is among the responsibilities of the Bureau.[67] In some instances, the Bureau has the preferential right to buy agricultural land, or even the duty to purchase it.[68]

The Bureau has been engaged in a significant volume of transactions in agricultural land. In 1986, the Bureau had nearly 50,000 hectares under its administration. This total included primarily land owned by the Bureau, but also a small number of hectares held by the Bureau as tenant.[69] During 1986, the entity purchased 5200 hectares; normally the annual amount of land purchased ranges between 4500 and 6000 hectares.[70] During the same year, the Bureau transferred 6400 hectares, more land than it purchased, to new owners. This relationship is consistent with the objective to convey land to the appropriate new owners, rather than to retain it indefinitely.

In connection with implementation of the *Relatienota* policy, another important task of the Bureau involves the conclusion of management agreements with individual land owners and users located in management and reserve areas. These are the subject of more detailed

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gronden (Agricultural Lands Management Association).

This association was founded in 1946 with the stated goal of management, restoration, and improvement of agricultural land, as well the goal of ensuring that ground would not be used in a way contrary to the general interest. The association could purchase and sell real property. In 1977, the primary task of the association was restructured; its new responsibility was to protect the use of ground most desirable from the point of view of the general interest. Inleiding, Wet agrarisch grondverkeer, XXIX, Ned. Staats. 175 (1984) (quoted from the Memorie van toelichting at 25).

The *Stichting* was dissolved as of 1 June 1983. Beshikking van de Staatssecretaris van Landbouw en Visserij van 21 december 1982 houdende opheffing van de Stichting Beheer Landbouwgronden, Nr. J. 7130 (Stcrt. 249), *reprinted in* Ned. Staats. 175, at 110-111 (1984). The rights, duties, and obligations of the *Stichting* passed over to the Bureau. Wet agrarische grondverkeer, *supra* note 63, art. 67.

65. Wet agrarisch grondverkeer, *supra* note 63, art. 29. This form of regulation is referred to as *algemene maatregel van bestuur*.

66. Beschikking van de Staatssecretaris van Landbouw en Visserij van 28 december 1982, Nr. J. 7164 (Stcrt. 253) betreffende de werkzaamheden van het bureau beheer landbouwgronden, *reprinted in* Ned. Staats. 175, at 141 (1984). Among these laws and regulations are land development, afforestation, creation of buffer zones, and other purposes.

For a discussion of the land purchase responsibilities of the Bureau, *see* Hovinga, *Het Bureau Beheer Landbouwgronden als het grondbedrijf in het landelijk gebied*, 16 BEDRIJFSONTWIKKELING 274 (1985).

67. *Id.* art. 2, lid. k.

68. *Id.* art. 2, leden o, p. On the preferential right, *see* Wet agrarisch grondverkeer, *supra* note 63, arts. 37-52; on the duty to purchase, arts. 53-56. *See also* text accompanying notes 157-166 *infra*.

69. Interview with W. de Boer and P. Scheele, Directie Beheer Landbouwgronden (June 3, 1987).

70. *Id.*

discussion later in this article.[71]

In its transactions, the Bureau is normally represented by its director, a civil servant from the Ministry of Agriculture and Fisheries.[72] The Bureau itself has no separate personnel; Ministry employees carry out some of its functions. In addition, some of its activities are carried out by individuals who contract to do the required work and who, with proper approval, may receive power of attorney.[73] The Bureau's land purchases are negotiated by private individuals (not civil servants) who are paid on a per-hour basis; these individuals are normally experienced and knowledgeable about land purchase and prices. The tasks of the Bureau can be accomplished efficiently because normal activities can occur without special authorization.[74] Some financial commitments involving large sums, however, must receive prior ministerial approval.[75]

2. Commissie Beheer Landbouwgronden

Another important entity, this one more than a juridical person, is the *Commissie Beheer Landbouwgronden* (Central Committee for Land Management). Also authorized by the law on the transfer of agricultural land,[76] the Committee was constituted in November 1981.[77] The chair is named by the government, and the secretary of the Committee is the director of the *Bureau Beheer Landbouwgronden*.[78] The Committee, which meets at least twice a year,[79] may consist of sixteen members;[80] these include representatives of several ministries, organizations of lower government, farm and forestry organizations, and nature protection societies.[81]

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71. Beschikking beheersovereenkomsten 1983, as amended, arts. 24, 25. Beschikking van de Staatssecretaris van Landbouw en Visserij van, 24 december 1982, Nr. J. 7417 (Stcrt. 253). The *Beschikking* has been amended several times: 1983 Stcrt. 80; 1986 Stcrt. 139; 1987 Stcrt. 115, 130.

72. Wet agrarisch grondverkeer, *supra* note 63, art. 32. The director of the Bureau is also director of the Directie Beheer Landbouwgronden.

73. *Id.* art 32, lid 4. *See also* Beschikking betreffende de vertegenwoordiging van het bureau beheer landbouwgronden, art. 4. Staatssecretaris van Landbouw en Visserij van 13 december 1982, Nr. J. 5602 (Stcrt. 244) *reprinted in* Ned. Staats. 175, at 109 (1984) [hereinafter Beschikking betreffende de vertegenwoordiging].

74. Beschikking Financieel beheer bureau beheer landbouwgronden, art. 6. Besschikking van de Minister van Landbouw en Visserij van 17 augustus 1982, Nr. J. 3694 (Stcrt. 160), *reprinted in* Ned. Staats. 175, at 99.

75. Beschikking betreffende de vertegenwoordiging, *supra* note 73, art. 3.

76. Wet agrarisch grondverkeer, *supra* note 63, art. 30.

77. Boelen, *Organen bij het beheer van landbouwgronden*, 16 BEDRIJFSONTWIKKELING 279, 279 (1985). The Committee was established to replace the administration of the *Stichting Beheer Landbouwgronden*.

78. Wet agrarisch grondverkeer, *supra* note 63, art. 31, leden 3, 4.

79. Besluit van 30 oktober 1981, Stb. 677, houdende voorschriften betreffende de samenstelling en de werkwijze van de commissie beheer landbouwgronden, *reprinted in* Ned. Staats. 175, at 85 (1984)[hereinafter Besluit van 30 oktober 1981].

80. Wet agrarisch grondverkeer, *supra* note 63, art. 31, lid. 3, 6.

81. Besluit van 30 oktober 1981, *supra* note 79, art. 2.

Members serve for renewable five-year terms.[82]

The Central Committee provides general guidance for the Minister of Agriculture and other ministers on the subject of agricultural land policy and prices, as well as on policies concerning the relationship between agriculture and nature and landscape. In addition, it provides general guidance and supervises the activities of the *Bureau Beheer Landbouwgronden.* The Committee makes policy connected with transactions involving agricultural ground as well as implementation of *Relatienota* programs and the European Economic Community mountain-farmer rules.[83]

Subcommittees can be established to assist in the work of the Committee.[84] Each province in Holland has a Provincial Committee for Land Management, charged with local responsibilities connected with *Relatienota* activities, especially the development of management plans, and activities on behalf of the Central Committee.[85] Chaired by a member of the provincial Deputed States, the local committee consists of twelve members, representative of interested organizations and governmental entities, who serve three-year terms.[86] The provincial committee can also establish subcommittees to assist in its activities.[87]

3. *Directie Beheer Landbouwgronden*

Although the *Bureau Beheer Landbouwgronden* is an artificially created legal entity with no separate personnel, its activities are carried out under the responsibility of the Ministry of Agriculture and Fisheries. Employees of the *Directie Beheer Landbouwgronden* (Government Service for Land Management), a subunit of the Ministry, carry out the regular activities of the Bureau. The Government Service, with central offices in Utrecht and representatives in each province, performs activities in the areas of structure and management regulation for agricultural lands, and activities involving acquisition, management, and transfer of land.[88] Many of its decisions, particularly land conveyances and contracts, are then executed by the Bureau.

III. IMPLEMENTING THE *RELATIENOTA* POLICY

The *Relatienota* recognized the importance of accommodating both

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82. *Id.* art 3 (the maximum age of service is 65 years).

83. Wet agrarisch grondverkeer, *supra* note 63, art. 30. *See also* DIRECTIE BEHEER LANDBOUWGRONDEN, *supra* note 62, at 24.

84. Besluit van 30 oktober 1981, *supra* note 79, art. 6.

85. Instellingsbeschikking provinciale commissies beheer landbouwgronden, art. 1. Staatssecretaris van Landbouw en Visserij van 2 december 1982, Nr. J. 6828 (Stcrt. 236), *amended by* Nr. J. 73 (Stcrt. 9) (January 9, 1984) *reprinted in* Ned. Staats. 175, at 104 (1984). The document was also amended by 1985 Stcrt. 13 and 1987 Stcrt. 130.

86. *Id.* arts. 2 & 4.

87. *Id.* arts. 11-13.

88. Boelen, *supra* note 77, at 280.

agricultural and/or nature values in vulnerable rural landscapes. The policy established in that document reflects two goals. The first is the maintenance and development of natural-scientific and landscape values in the most valuable agrarian cultural landscapes through an adaptation of the agricultural management. This goal is to be achieved in part by giving farmers the opportunity to enter management agreements voluntarily. The second goal is the financial subsidization of the sometimes difficult position of farmers who carry out the farm business in areas valuable for landscape and natural-scientific characteristics.[89]

As earlier discussion has suggested, these broad goals are to be achieved in part by the establishment of *Relatienota* areas: a limited number of geographically-defined regions of particular natural values and vulnerability in which attempts are made to manage the land in light of those values. Because of the different characteristics and vulnerability of these natural environments, two types of areas are possible: management areas and reserve areas.

Management areas are regions in which the present value of nature and landscape is particularly significant. They often harbor important animal species like meadow birds. Nonetheless, in these areas agricultural production is also important and can be continued, often with less intensity and without threat to natural values. In management areas, the objectives of maintaining present nature values and continuing agricultural use of the land are equally important. In these areas, integration of land use functions—agriculture and nature or landscape—is the goal. It is anticipated that farmers will continue to own and manage their land. They will be offered the opportunity, however, to enter contractual management agreements, under which they will receive financial compensation for adapting their farming practices to the requirements of nature and landscape preservation.

Reserve areas are significant both because the present values of nature and landscape are high and because they offer potential for future development of these values. The objectives in reserve areas are to maintain the present values and to increase the potential values. These areas often harbor valuable botanical species (for example, orchids) that are threatened by modern agricultural practices. Continued agricultural use is inconsistent with protection of vulnerable ecosystems; the adaptations in management required to preserve those ecosystems would be too intrusive to allow effective agricultural production. Moreover, the desired management of natural values can ultimately be provided only under supervision of a nature protection organization.

The goal in reserve areas is therefore eventually to end farming entirely. Land in these areas is to be purchased by the *Bureau Beheer*

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89. COMMISSIE BEHEER LANDBOUWGRONDEN, MINISTERIE VAN LANDBOUW EN VISSERIJ, BUREAU BEHEER LANDBOUWGRONDEN, JAARVERSLAG 1985, at 26 (1986) [hereinafter BBL, JAARVERSLAG 1985].

Landbouwgronden and transferred to conservation organizations, either governmental or private organizations, for specialized management.[90] Farmers are not forced to sell, but may do so voluntarily. In reserve areas, the Bureau has an obligation to purchase land offered to it.[91] Until the time of sale, however, farmers in reserve areas have the opportunity to enter into management agreements. These are viewed as transitional, intended to bridge the years between designation of the region as a reserve area and actual creation of the reserve through purchase of the land.

A. *Choosing the Relatienota Area*

Eventually it is expected that 200,000 hectares of vulnerable land will be protected through the *Relatienota* measures.[92] The intention is that 100,000 hectares will be devoted to management areas and the remaining 100,000 hectares to reserves.[93] Actual implementation of the program, however, has occurred slowly and requires decision-making at three separate stages. The first stage involves the general identification of regions to be designated *Relatienota* areas; the second includes the specific delineation of the borders of these regions and the assignment of status as management or reserve area; the third involves establishment of the management plan[94] as well as the purchase of ground in reserve areas and the conclusion of management agreements.[95]

The first phase of the procedure involves consultation between the state government and provincial authorities, a process that has moved rather slowly. The government started to implement the *Relatienota* policy in 1977 by identifying and recommending to provincial authorities 86,000 environmentally sensitive hectares that most urgently needed protection.[96] Some of these areas were located within land development projects in preparation or in performance. Actual designation of these regions as *Relatienota* areas required agreement with provincial authorities, some of whom were reluctant to proceed, in part because the effects of the designation were unclear.[97] By the end of 1985, however, agreement had been reached with most provincial authorities concerning those

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90. For example, the *Staatsbosbeheer* (Forestry Service) manages a significant amount of reserve land retained by the government.

91. Beschikking beheersovereenkomsten, *supra* note 71 art. 76. *See also* art. 68, and *infra* text accompanying notes 157-166, *infra*.

92. *See* Nota landelijke gebieden, deel 3E, *supra* note 58, at 23. For a brief discussion of management agreements in Holland, *see* Bennett, *Management Agreements in the Netherlands*, Annex 3 in COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 13, at 153-84.

93. Boelen, *De Relatienota in de praktijk*, 16 BEDRIJFSONTWIKKELING 269, 270 (1985).

94. *See infra* text accompanying notes 111-136.

95. BBL, JAARVERSLAG 1985, *supra* note 89, at 26-28.

96. *Id.* at 26. The document in which these areas were identified, along with an explanation of the method of selection, was the so-called *Voorrangsinventarisatie Relatienotagebieden*.

97. Boelen, *supra* note 93, at 271.

86,000 hectares;[98] during 1986, global identification took place by the Minister of Housing, Physical Planning and the Environment, in agreement with the Minister of Agriculture and Fisheries.[99] In addition, provinces have been invited to submit their own suggestions for areas to include within the last 14,000 hectares.[100] Although it is expected that eventually another 100,000 hectares will come under the *Relatienota* policy, no money for expansion of the program is now available. Implementation of the second phase will require a specific government decision.[101]

After the general identification of the *Relatienota* areas, the boundaries can be defined more specifically. Provincial authorities play a role at this second stage too, by submitting proposals for location of areas in their provinces. These proposals are the result of consultation with municipal authorities, water districts, and local organizations. In addition, farmers and interested authorities are consulted, a step viewed as essential for successful implementation of policy.[102]

Definite boundaries for *Relatienota* areas are established in light of provincial recommendations. Outside of land development areas, the boundaries are established formally by the Minister of Housing, Physical Planning and the Environment. Within land development projects, boundaries are set by the Central Land Development Committee.[103]

When an area is marked for special protection, the choice between treatment as management area or reserve is particularly critical; in the second stage of the *Relatienota* process, this choice must be made. Three criteria are important in deciding how to protect an area. The first is the vulnerability of the nature values to be protected in relation to the current agricultural management. Another is the adaptability and suitability of the desired nature-protection management within the agricultural management in the region. The third is cost. If the desired management of a highly-valued natural area is extraordinary, the annual cost of management compensation is too high. In such situations, the government

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98. BBL, JAARVERSLAG 1985, *supra* note 89, at 26.

99. COMMISSIE BEHEER LANDBOUWGRONDEN, BUREAU BEHEER LANDBOUWGRONDEN, JAARVERSLAG 1986, at 24 (1987) [hereinafter BBL, JAARVERSLAG 1986].

100. BBL, JAARVERSLAG 1985, *supra* note 89, at 26-27. Provinces have been assigned a share of the available hectares on the basis of existence of valuable cultural landscapes and occurrence of land development projects. During 1986, agreement for global identification was reached in only one province; three provinces have submitted suggested areas. In the other provinces, submissions are being prepared. BBL, JAARVERSLAG 1986, *supra* note 99, at 25.

101. BBL, JAARVERSLAG 1985, *supra* note 89, at 27. This decision, to be suggested by the Ministers of Finance, Housing, Physical Planning, and the Environment, and Agriculture and Fisheries, must be approved by the Parliament. Interview with W. de Boer and P. Scheele, Directie Beheer Landbouwgronden (June 3, 1987).

102. Boelen, *supra* note 93, at 271.

103. BBL, JAARVERSLAG 1985, *supra* note 89, at 26. By the end of 1986, definite boundaries had been established for 14,670 hectares of management areas and 25,961 hectares of reserve areas, for a total of 40,631 hectares. BBL, JAARVERSLAG 1986, *supra* note 99, at 25 (Tabel 9).

may save money by acquiring the property as a reserve, rather than designating it as a management area.[104]

This choice between reserve and management area is crucial for owners of land within the area. The establishment of a reserve always means that the government will attempt to obtain ownership and use of the land within the area, with a view to optimal management for nature and landscape values. As might be expected, nature protection interests press for reserve status; if a reserve is formed successfully, the ideal management for a vulnerable area can be assured.[105] Moreover, the role of those organizations in acquiring and managing vulnerable areas forms an essential justification for their continued existence and support by members and by government.[106] In contrast to a reserve, however, the designation of a management area means that agriculture will remain important for the region, and that farmers will be encouraged to continue to farm.[107] The preference of individual farmers for management area or reserve depends to some extent on their own situations. Farmers without successors to continue the farm business often have no objection to reserves. Others, especially in large *Relatienota* areas, may prefer the status of management area.[108] Although it was originally planned that the hectares designated as *Relatienota* land would be divided evenly between reserves and management areas, the first stage of the program has resulted in a majority of the land being established as reserves.[109]

B. The Management Plan

Even after the boundaries of a *Relatienota* area have been established, the policy of accommodation of agriculture and nature cannot be implemented immediately. Instead, more detailed planning is required.[110] This stage of the process is governed by a regulation called the *Beschikking beheersovereenkomsten 1983* (the management agreement decree).[111]

1. Preparing the Plan

The Central Committee for Land Management assumes an important

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104. Wind, *supra* note 24, at 113. *See also* Biewinga & Schröder, *Beheersgebied of reservaat*, 46 AGRARISCH RECHT 106, 107 (1986).

105. Wind, *supra* note 24, at 114.

106. *See* Biewinga & Schröder, *supra* note 104, at 113.

107. Boelen, *supra* note 93, at 271.

108. Biewinga & Schröder, *supra* note 104, at 114.

109. About 60 percent of the first 100,000 hectares is designated as reserves. Interview with Drs. P. Slot, Director of Directie Beheer Landbouwgronden (July 22, 1987). *See* Biewinga & Schröder, *supra* note 104, at 109-110, for a description of the changes in expected designation between the *Voor rangsinventarisatie* and the sitatution in 1985, as well as some reasons for the changes.

110. For a brief case study of a management area in the northern Holland province of Friesland, *see* Bennett, Annex 3, *supra* note 92, at 161-69.

111. Beschikking beheersovereenkomsten 1983, *supra* note 71.

role in planning, as specified in the *Beschikking beheersovereenkomsten*, which applies as soon as an area is designated.[112] After each management or reserve area is defined, the Committee is to establish a cadastral description, with reference to an accompanying map, and give notice to the public and to interested governmental authorities.[113] Before farmers in the area can be offered the opportunity to enter management agreements, a management plan must be in effect. This plan is established formally by the Central Committee, but the plan is actually drafted under the supervision of the appropriate provincial committee for land management.

The provincial committee of the province in which the area, or the greatest part of the area, is located prepares a draft management plan.[114] This process may begin as soon as the area is globally identified; the provincial committee need not wait until the management or reserve area has been described cadastrally.[115] Although the provincial committee is charged with this responsibility, in practice part of the work is done by a subcommittee appointed by the provincial committee. Consisting of members of the provincial committee, as well as several representatives from the local area (farmers or representatives of nature protection organizations), the subcommittee can ensure better communication with residents of the area and more ready acceptance of the nature conservation policy.[116] Formal consultation with interested governmental authorities is re-

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112. BBL, JAARVERSLAG 1986, *supra* note 99, at 26.

113. Beschikking, *supra* note 71, (arts. 3 and 13). Until amendments to the *Beschikking beheersovereenkomsten* in 1986, 1986 Stcrt. 139, the Central Committee first had to declare that an area, assigned as a *Relatienota* area by the proper authority, came under the operation of the *Beschikking*. Until amendment, the *Beschikking* also specified that, in preparation for declaring the *Beschikking* applicable to an area, the director of the *Bureau Beheer Landbouwgronden* could request the provincial committee to prepare a preliminary draft plan, in consultation with various lower governmental authorities. *Id.*, arts. 7, 8, 9 (These articles were omitted in the 1986 amendment). Because the provincial committee can begin to draw up a draft plan at the time the area is globally identified, the preliminary draft is no longer necessary. Toelichting bij de wijziging van 18-7-1986, Nr. J. 3861 (Stcrt. 139).

114. Beschikking, *supra* note 71, art. 10, lid. 1, 2, 4, and art. 11. In article 10(1) the Central Committee can decide that a plan, rather than a draft, be drawn up for a reserve area. In article 10(2) the Committee can call attention to special characteristics of the area or its agricultural management, as well as the implications of these for the establishment of the plan. *Id.* art. 10, lid. 4. The plan is to be drafted in consideration of certain provisions listed in the Beschikking.

If a *Relatienota* area is located in more than one province, coordination and agreement between the two provinces is expected. *Id.*, art. 11.

115. Toelichting bij de wijziging van 18 july 1986, Nr. J. 3861 (Stcrt. 139). Prior to this amendment, the *Beschikking* had to be declared applicable in an area before work on the plan could begin. See *supra* note 113.

116. Interview with W. de Boer and P. Scheele, Directie Beheer Landbouwgronden (3 June 1987). See also Instellingsbeschikking provinciale commissies beheer landbouwgronden, *supra* note 85. Contact with farmers in the region (or, in larger areas, with representatives of farmers) is seen as essential for the success of the *Relatienota* program. The cooperation of social-economic and business advisors is also important to help farmers understand the program. Boelen, *supra* note 93, at 272. *See Toelichting op het beheersplan*

quired during development of the plan.[117]

Several considerations are paramount in drafting an acceptable plan. The management specifications included must be adaptable to current agrarian management and be reasonable to the farmer in technical, economic, and organizational respects. In addition, they must contribute effectively to the protection or development of nature values. The cost of the specifications must be reasonably related to the effect for nature; measures with high cost and relatively little impact on nature must be avoided. Finally, there must be a practical way to ensure that farmers actually carry out the required management practices.[118]

When the draft of the management plan has been prepared and the director of the *Bureau Beheer Landbouwgronden* has given approval, the provincial committee must send the draft to organizations with whom formal consultation occurred, and make the draft available for public inspection and comment.[119] After considering the comments, adapting the plan accordingly, and making a report, the draft management plan is placed in the hands of the Central Committee.[120]

The Central Committee establishes the plan formally. It may make changes in the draft, provided that it first consults with the provincial committee. The Central Committee also sets the date on which the first management period begins.[121] Normally, the management period is established for 6 years. Farmers within the *Relatienota* area receive notice of the establishment of the management plan and the time that the first management period begins. In addition, these land users also learn where and how they can make known their wishes to enter a management agreement, and which persons with rights in the land must also sign the

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voor het beheers- en reservaatsgebied Westzaan, in COMMISSIE BEHEER LANDBOUWGRONDEN, BEHEERSPLAN WESTZAAN at 2 (1986). The subcommittee constituted in that region consisted of 2 agricultural representatives from the area, 1 representative of a ground-managing nature protection organization in the region, 2 members of the provincial committee, a secretary, and 2 advisors representing livestock interests and a municipality. The role of the subcommittee was to draw up a concept-draft plan, coordinate consultation in the region between farmers and nature protectors, increase the quality of the plan through use of local knowledge and experience, and increase the involvement (*betrokkenheid*) and understanding with regard to the management rules.

117. Beschikking, *supra* note 71, art. 13. The provincial committee must consult with municipalities and water districts within which the *Relatienota* area is located, and with any other institutions identified by the Central Committee. In addition, when the area is located within a land development project, consultation with the appropriate committee for that project must occur.

118. Boelen, *supra* note 93, at 272.

119. Beschikking, *supra* note 71, arts. 14-15. The public notice may not take place until after the Director of the Bureau has agreed and the Central Committee has described the area cadastrally. *Id.* art. 14, lid 2.

120. *Id.* art. 16.

121. *Id.* art. 17. The date on which the first management period begins is always the first day of a calendar quarter. Boelen, *supra* note 93, at 273. After the management plan is established, amendments are possible, even before the end of a management period. *See Beschikking*, arts. 19-23.

agreement.[122]

2. Contents of the Plan

Although formation of the management plan must follow the required procedure, the contents of each individual plan will be tailored to the management requirements of the area involved. Nonetheless, the *Beschikking* requires each plan to include details concerning the natural values in the area and the adaptations required to preserve those values.[123] An explanation of these requirements will provide background useful to the later consideration of management contracts based on the plan.[124]

As a starting point, the management plan must describe for its area the goals of nature and landscape management that are to be pursued in connection with agricultural management.[125] This part of the plan normally describes the natural and landscape values, including information about the scenic values, as well as the presence of vulnerable animal and plant species.[126] Although the plan itself is relatively brief, an explanation attached to the plan may give more detail.[127] The goals established must be realistic; for a management area especially, they must be adaptable to continued agricultural production.

These goals are designed to be met by adaptations in agricultural management practices. Thus, in addition to the goals, the plan must specify the practices—actions to be taken or actions to be omitted—that can occur on the farms in the area. The plan should specify the circumstances under which the practices are to take place, the form they will take, and the dates on which they will occur.[128] The practices vary and include such items as maintaining present water levels, refraining from using chemical pesticides, limiting the number of grazing animals per hectare during certain periods, delaying mowing until bird-breeding season is over, and limiting the amount of manure applied during certain periods.[129] The desired practices are often grouped into different "packets" of several practices, designed to achieve different levels of protection. The farmer then may

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122. Beschikking, *supra* note 71, art. 18.

123. *Id.* art. 5.

124. *See infra* text accompanying notes 139-156.

125. Beschikking, *supra* note 71, art. 5, lid a.

126. *E.g.*, COMMISSIE BEHEER LANDBOUWGRONDEN, BEHEERSPLAN WESTZAAN, *supra* note 116, at 2. The Westzaan region includes both management and reserve area. The plan for the region describes the species of meadow birds and rare plants that thrive in the area, with its geography influenced by digging of peat in earlier centuries. A general goal of maintaining the rich, characteristic landscape is accompanied by specific goals of maintaining and restoring the varied and rich bird and flora populations.

127. *See, e.g.*, *Toelichting*, in COMMISSIE BEHEER LANDBOUWGRONDEN, BEHEERSPLAN WESTZAAN, *supra* note 116.

128. Beschikking, *supra* note 71, art. 5, lid b.

129. COMMISSIE BEHEER LANDBOUWGRONDEN, BEHEERSPLAN WESTZAAN, *supra* note 116, at 3.

choose the packet most appropriate and adaptable to his business. Of course, the compensation the farmer receives is related to the severity of the packet of practices chosen.

Compensation promised to the farmer is based in part on the effect of the desired management practices on the farmer's income and expenses. If practices designed to protect natural values will mean lower production (and thus less income), more working hours (for example, for mechanical rather than chemical weeding), or fewer expenses, these results are reflected in the compensation. To ensure that these determinations can be made rationally, especially in the future, a standard of comparison is necessary. Therefore, an important part of the management plan is identification of a so-called reference or comparison area, which can be used to establish normal agricultural management, expenses, and income.[130] The area chosen must be similar in nature and types of agricultural practices, but production in the comparison area occurs without the constraints of management agreements.

Further, the management plan must describe the design and practice of farms in both the *Relatienota* area and the reference area.[131] This description includes characteristics of the farms in the regions (for example, size, use of the land, number of animals, production levels, mowing dates, and application of artificial and natural fertilizer) and identification of external production circumstances (for example, parcel size, number of parcels per farm, and presence of ditches).

The compensation to be awarded to individual farmers is established on the basis of foundations articulated in the management plan.[132] These foundations reflect the differences in production levels, increases in labor requirements, and changes in work costs that flow from the various management practices required for nature and landscape protection.[133] These differences vary with the restrictiveness of the management practices. Thus, the difference in production level must be calculated for each of the possible management packets available to farmers in the area. Also, the various packets will not be identical in the amount of extra labor required or the savings in work costs. A monetary value is eventually attached to each of these various effects of management practices.[134] These monetary amounts are adjusted annually, on the basis of price developments in agriculture.[135] Hence, the actual compensation payable to the farmer, determined on the basis of foundations set out in the plan, will depend on the packet chosen by each farmer and the current financial situation in agriculture. The management plan must also include an ap-

130. Beschikking, *supra* note 71, art. 5, lid d.

131. *Id.* art. 5, lid c.

132. *Id.* art. 5, lid e.

133. *Id.* art. 6.

134. Beschikking, *supra* note 71, Bijlage.

135. Interview with W. de Boer and P. Scheele, Directie Beheer Landbouwgronden (3 June 1987).

pendix that lists the actual compensation, usually in guilders per hectare, to be received by farmers who follow the management practices required in each of the various packets.[136]

C. *Management Agreements*

Only after the management plan has been established can the *Relatienota* policy actually begin to operate effectively. For management areas (and for reserve areas, too, before the land is acquired by the *Bureau Beheer Landbouwgronden*),[137] implementation of the policy on individual parcels of land occurs when *beheersovereenkomsten* (management agreements)[138] are signed for those parcels.

1. *Entering the Contract*

Management agreements are private-law contracts, entered between individual farmers and the Bureau, which acts as the contracting party for the government.[139] The *Beschikking Beheersovereenkomsten* specifies the procedure for entering these voluntary agreements. When a land user indicates his willingness to sign a contract, he must indicate what parcels of land he offers for the agreement, which of the possible packets of management obligations he is willing to follow, and what (if any) ownership of the land he enjoys.[140] The farmer need not commit to an agreement all the land within a management area that belongs to his farm; instead, he is free, within the framework of the management plan, to limit the size of the area he encumbers with a contract.[141] In addition, by choosing the nature preservation obligations he will follow, the farmer can tailor the agreement to the needs of his own farm. Thus, not all farmers within a single management area will be obligated to carry out the same manage-

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136. Beschikking, *supra* note 71, art. 5, lid f.

137. In some situations, the use of *beheersovereenkomsten* in reserve areas is limited. When the land is owned by a public law body or a nature protection organization that manages ground, certain users who began their activities after 1 December 1977 cannot enter contracts. *Id.* art. 24, lid 2.

138. The *beheersovereenkomst* is one of a number of extra-legal, financial instruments, which have proved to be popular during times of economic boom. For such instruments, the government makes money available to the citizen who is willing to perform or refrain from certain activities that fit desired governmental policy. Brussaard & van Wijmen, *supra* note 9, at 175.

139. Beschikking, *supra* note 71, art. 24, lid 1.

140. *Id.* art. 26, lid 1.

141. This increased flexibility is the result of a 1983 amendment to the *Beschikking*. Earlier, the farmer had to enter a management agreement for all his land lying within the *Relatienota* area. *See* Toelichting bij de wijziging van 21-4-1983, Nr. J. 1578 (Stcrt 80). In addition, the amendment made it possible for the farmer to choose between different combinations of management obligations.

In 1985, statistics indicated that on 40 percent of farms with contracts, 30 percent of the surface or less was obligated under the contract. For 15 percent of farms, the surface was 30 to 50 percent; and for the remaining 45 percent, 50 to 100 percent of the ground surface. *See* Boelen, *supra* note 93, at 273.

ment activities. Each farmer who signs a contract will be committed to some basic management requirements, but other supplementary obligations may vary.[142] If the farmer who wants to enter the contract is not the owner of the land, there must be an indication that the lessor or other owner is also willing to enter the contract; that owner must eventually also sign the management agreement.[143]

After the farmer has asked to conclude a contract, the Bureau considers the request. The Bureau must ensure that the farmer is actually operator of a farm located completely or partly in the *Relatienota* area.[144]In addition, the Bureau must be certain that the management obligations the farmer is willing to assume are consistent with the possibilities created by the management plan for the area.[145] The Bureau need not conclude contracts for parcels on which no contribution would be made to the management goals articulated in the plan.[146] Moreover, the *Beschikking* makes clear that no contract need be entered if, under an agreement in an earlier management period, the acts or omissions of the operator seriously hindered realization of the goals of nature and landscape described in the management plan.[147] If the farmer's request for an agreement is rejected, however, he may appeal to the Minister of Agriculture and Fisheries.[148]

When the Bureau decides that an agreement is desirable, it must be offered in writing to the farmer.[149] The contract consists of several parts. The first part establishes the identity of the parties, describes the land both in cadastral terms and on a map. It states that the farmer is to manage the described land from the viewpoint of nature and landscape, and that the Bureau is obligated to pay compensation of a specific amount, subject to annual adjustment. Attached to these specific provisions are a number of general conditions that incorporate relevant provisions of the *Beschikking Beheersovereenkomst*. Finally, the contract lists the specific management treatments—measures to be taken or activities to be avoided—to which the farmer is obligated. The treatments regulate activ-

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142. Wind, *supra* note 24, at 116.

143. The *Beschikking* refers to signing by the lessor or by the "*blooteigenaar*" (that is the owner of land which is subject, for example, to a hereditary lease). Because of the ownership changes involved in land development, some variation from the requirement of signature by the present owner is specified. Beschikking, *supra* note 71, art 25, lid 2; art 26, lid 3.

In practice, the requirement that the owner sign the management agreement has meant that contracts on a considerable surface area have failed. The ground user was willing to sign, but the land owner would not cooperate. BBL, JAARVERSLAG 1985, *supra* note 89, at 30.

144. In practice, the head of the provincial bureau office performs this task on behalf of the central *Bureau Beheer Landbouwgronden*. *See* DIRECTIE BEHEER LANDBOUWGRONDEN, BEHEERSOVEREENKOMSTEN OP HET AGRARISCHE BEDRIJF, 12 (1985).

145. Beschikking, *supra* note 71, art. 27, lid 1.

146. *Id.* art. 27, lid 2, 1e.

147. *Id.* art. 27, lid 2, 2e. This provision was added in 1986 Stcrt. 139.

148. *Id.* art. 28. The rejection must be accompanied by reasons, and appeal must be submitted in writing within 30 days of the rejection.

149. *Id.* art. 29, lid 1.

ities like maintenance of water levels; protection of special landscape elements; date of mowing grass, application of fertilizers, pesticides, and other chemicals; and numbers of grazing animals permitted. These measures, tailored to each area and to each parcel, are intended primarily to protect breeding birds, as well as to preserve valuable and vulnerable vegetation.

A management contract will usually then be entered for the duration of the six-year management period. If the contract is entered after a management period has already begun, that contract will be in effect for the remaining duration of the management period. Although the normal contract is intended to last for the entire management period, some flexibility is available so that the farmer who is unsure of the acceptability of a contract may try out the management practices. The farmer has an opportunity to operate his farm under the contract for a one-year trial period; the contract may be terminated if the farmer gives notice at least 30 days before the end of the year.[150]

When a contract has been in effect during a management period, it is presumed to be renewed for the next six-year period, unless a party gives notice at least one month before the end of the period.[151] To ensure that the farmer enjoys some certainty in adapting his farm operation to the required management, the Bureau's right to end the agreement is limited, when one or more of the other parties prefer to continue.[152] Moreover, the Bureau is also prohibited from seeking to end the agreement if nature and landscape protection requirements, established through law or administrative provisions, mean that the farmer will be unable to follow management that is available in the comparison area.[153] Management agreements may also be ended if, by decision of the Central Committee, the land involved is no longer part of a *Relatienota* area.[154]

Despite the presumption of continuation and some restrictions on ending management agreements, the *Beschikking* allows some flexibility in changing the management obligations required of the farmers. The management plan itself may be amended, following procedures similar to

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150. *Id.* art 56. The one-year trial period was introduced in the regulation in 1983 Stcrt. 80.

151. *Id.* art 56, lid 3. If a party to a contract dies, the rights and obligations under that management agreement pass on to his heirs. *Id.* art. 73.

152. *Id.* art. 57, lid 1.

153. *Id.* art. 57, lid 2.

154. *Id.* art. 58, lid 1. In this case, the agreement ends on the first day of the fourth month after written notice from the bureau to the other parties.

Originally, the *Beschikking* provided that the Committee could not decide to remove land from the area if legal or administrative provisions focusing on goals of nature and landscape preservation made it impossible for the farmer to carry out management available in the comparison area. *See* Beschikking 1982 at art. 58, lid 2 (This provision was eliminated by 1986 Stcrt. 139).

Article 59 of the *Beschikking* makes special provision for *beheersovereenkomsten* connected with land in land development areas.

those required for establishing the plan.[155] Moreover, if the Committee changes the obligations to which farmers in an area are bound, the management agreements terminate at the end of the management period, unless the parties agree to replace the contract with a new one that includes the new obligations.[156]

2. *Sale of Land in a Relatienota Region*

Land in *Relatienota* areas is marked for special management. Sale of that land, especially after a contract has been entered to ensure the required management, may constitute a threat to the continued protection of the land. Thus, special requirements operate to ensure that management will not cease at the sale of the land. These requirements also are designed to maintain the value of the farmers' land, despite its dedication to nature protection.[157] The obligations connected with sale are different for management and reserve areas.

Transitional management agreements may be entered for land in reserve areas, before the reserve land is acquired by the Bureau. As soon as a farmer on a parcel of contracted reserve ground stops using the land, the owner of the land is obligated to offer the Bureau the first opportunity to purchase the land, a duty referred to as the *optierecht*.[158] This obligation, however, is limited; it does not apply if the farm is used by specific successors (family members) who agree to follow the provisions of the management agreement.[159] In addition, the duty to offer the land to the Bureau also applies when the owner of the land, usually the lessor, decides to sell it, even though the farmer-tenant or a successor plans to continue to farm under the terms of the management agreement.[160]

When the owner of reserve land that is operated under a manage-

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155. Beschikking, *supra* note 71, arts. 19-23.

156. *Id.* art. 60, lid 1. The agreement can end at the conclusion of the next following management period, if the farmer gives one month notice to the other parties. The *Bureau* must give prompt notice of changes to the other parties. *Id.* art. 60, lid 2. There are special provisions for revised management agreements when an area is changed from a reserve area to a management area and vice versa. *Id.* art. 61.

157. *See generally* de Boer, *De positie van landeigenaren in beheers- en reservaatsgebieden*, 28 DE LANDEIGENAAR 94 (1982).

158. The provisions regarding sale of land, like other requirements set out in the *Beschikking*, are incorporated in the general provisions that form part of every contract. Beschikking, *supra* note 71, art. 62.

159. *Id.* art. 62, leden 1, 2. The successor (or successors) may be a spouse, certain blood relatives, foster children, or other parties to the contract. The duty to sell can be lifted if the involved party is a public law body or a nature protection organization that manages ground, provided that the Bureau judges the body to act consonantly with the management plan. *Id.* art. 62, lid 3.

160. *Id.* art 63, lid 1. The obligation does not exist if the owner gives the tenant the opportunity to purchase, as required by farm tenancy laws (Pachtwet, arts. 56a-56h, Ned. Staats. 123 (1985)); if the owner mortgages the land; or in other limited circumstances.

Also the Bureau can lift the obligation where an easement is involved, if that easement is consonant with the management plan. Beschikking, art. 63, leden 2, 3.

ment agreement offers to sell the land to the Bureau, as required by the *Beschikking Beheersovereenkomst*, the Bureau may exercise its option to purchase the land, or it may decline to purchase and leave the land available for sale to third parties. If the owner can find no one to purchase the property, however, the Bureau is obligated, under the duty to purchase established in the *Beschikking*, to buy the land.[161] This duty applies to all land in a reserve area, regardless of whether it is subject to a management agreement.[162] The selling price is established by an appraisal requested by the Bureau. But that appraisal determines the price without consideration of the facts that agricultural practices on the land are restricted by a management agreement or that laws or regulations enacted to protect nature and landscape limit the activities that can be carried out on the land.[163] This requirement avoids the risk that land in a *Relatienota* area will decline in value. When an owner finds the appraised price unacceptable, another evaluation conducted by three persons may be carried out, and will bind the parties.[164]

In management areas, unlike reserves, the Bureau does not seek to acquire the land. Nonetheless, once a management agreement has been signed for land in a management area, the Bureau must ensure that the agreement stays in effect. Thus, the owner of land who wants to sell the property is obligated to satisfy the Bureau that his successor will also agree to the terms of the management agreement.[165] Of course, at the end of the contract term, the successor may choose not to continue the agreement. The Bureau has a duty to purchase in management areas also, if the owner is unable to find a purchaser who is willing to take over the management agreement. The same appraisal requirements as in reserve areas apply to establish the price in management areas.[166]

3. Violation of the Contract

Like any other contract, the management agreement imposes duties and obligations on the parties. The farmer must cooperate in permitting inspections to ensure that he is fulfilling the obligations of the agreement.[167] In practice, each *Relatienota* area is under the supervision of an employee of Government Service for Land Management, who makes inspections of the land parcels under contract. Inspection seeks to deter-

161. Beschikking, *supra* note 71, art. 66. This duty is called the *koopplicht*, or duty to purchase. *See* DIRECTIE BEHEER LANDBOUWGRONDEN, *supra* note 62, at 10. On the duty to purchase, *see also* Wet agrarisch grondverkeer, arts. 53-56, Ned. Staats. 175 (1984).

162. de Boer, *supra* note 157, at 96.

163. Beschikking, *supra* note 71, art. 68.

164. *Id.* art. 69. One member of the appraisal team is chosen by the objecting owner, one by the Bureau, and the third by the first two members of the team. The decision of the appraising team is made by majority vote.

165. *Id.* art. 65. This obligation does not apply if the owner grants a mortgage on the land or (in certain instances) allows an easement. *Id.*, art. 66.

166. *Id.* arts. 67-69.

167. *Id.* art. 75.

mine, for example, that a farmer who has contracted not to mow before a certain date has not mowed earlier. Regular inspections and surprise visits help to ensure that farmers actually earn their management compensation.[168]

A party who believes that another party has not observed the terms of the contract may serve notice of that belief on the offending party.[169] If the parties do not reach agreement about contract provisions concerning management obligations and payment of compensation within a month after the notice, the dispute can be submitted to a special dispute committee for a binding recommendation.[170] Each province has such a committee, which decides cases submitted to it on the basis of reasonableness and fairness.[171] The committee has the authority to assess a fine against a breaching party, with a maximum amount of twice the management compensation per hectare per year as specified in the agreement. In addition, if the farmer has failed to carry out management duties, the committee can require full or partial repayment of the management compensation for (at most) the past six years.[172]

4. Compensation

The availability of compensation for carrying out specified management practices helps to induce farmers to enter *beheersovereenkomsten.* This compensation has assumed increasing importance in a time when an additional levy has been imposed to limit milk production[173] and regulations have been issued to limit the production and use of manure.[174] Compensation from management agreements offers farmers the opportunity to make nature conservation a profitable enterprise that supplements other income from farming.

The *Beschikking* indicates that four types of compensation are available: management compensation, adaptation compensation, payment to the lessor, and payment at the termination of a management agree-

168. Interview with W. de Boer, Directie Beheer Landbouwgronden (22 July 1987).

169. Beschikking, *supra* note 71, art. 70. Notice must be sent by registered mail.

170. *Id.* art. 77, lid 1.

171. The dispute committees (*geschillencommissies*) are established and regulated by articles 77-79 of the *Beschikking.* Each province has a committee, consisting of three members who are not members of the provincial committee for land management. The secretary of the committee is the head of the provincial Bureau for Agricultural Land Management.

172. Beschikking, *supra* note 71, art. 71, leden 2, 3. Article 72 requires payment of the amounts ordered, on demand and without further legal intervention.

173. *See* Beschikking superheffing, Beschikking van de Minister van Landbouw en Visserij van 18 april 1984, Nr. J. 1731 (Stcrt. 79), as amended, reprinted in Ned. Staats. 110S (1987).

174. On the recent regulation concerning manure, see Brussaard, *De nieuwe regelgeving betreffende de produktie van dierlijke meststoffen,* 47 AGRARISCH RECHT 402 (1987); Brussaard, *Mest als nieuw terrein van Milieurecht,* chapter 6 in ONTWIKKELINGEN IN HET MILIEURECHT (M. Aalders & N. Koeman eds. 1987). See also *The Manure Action Program in the Netherlands,* 4 Conservation Focus (Aug. 1987) (NASDA Research Foundation Farmland Project).

ment.[175] The compensation available to participating farmers is established in conjunction with the management plan for each *Relatienota* area, on the basis of factors established in the *Beschikking*.[176]

a. *Payment under the management agreement*

The management compensation is intended to pay the farmer for losses in production and extra expenses encountered in connection with performance of the special nature-protection obligations required by the management agreement. It consists of an amount of money paid per calendar year per hectare, for carrying out the practices required by the *beheersovereenkomst*.[177] Each management plan specifies the compensation available for adapting the various possible packets of management obligations. Therefore, every farmer in the same area who adopts a specific packet will receive the same per-hectare annual compensation.

It is intended that the farmer who enters a management agreement will suffer no loss of income. Hence, the reference area[178] serves as the standard by which the effects of the special management on the farmers' income and required labor are measured. These effects are quantified in the management plan for each *Relatienota* area. Management compensation, then, consists of payments for decline in returns from the land[179] and extra labor requirements, such as extra time spent in mechanical weeding. Adjustments are also made for differences in expenses, such as savings from postponement of work or nonuse of fertilizers, and costs for manure storage. Compensation is adapted annually, on the basis of price developments in agriculture.[180]

The farmer who adapts his management to the requirements of nature and landscape may no longer be able to use his facilities to capacity. For example, if the management practices limit the production of grass, the farmer will be able to feed fewer cows and will have empty stalls in the barn. To compensate the farmer for this "slack" in the operation and for the structural changes needed to adjust, adaptation payments are available.[181] The amount depends both on the decline in production relative to the initial situation as a result of implementation of management

175. Beschikking, *supra* note 71, art. 30, lid 2.

176. *Id.* art. 30, leden 1, 3; arts. 5 & 6.

177. *Id.* art. 31, leden 1, 2.

178. *See supra*, text accompanying notes 130-131.

179. Declines in returns are calculated in units called Dutch feed units lactation per kilogram feed (*kilo voedereenheid melk* or kVEM) per hectare. The kVEM refers to the amount of feed needed for the cow to produce one kilogram of milk. The value of this unit is established annually (for 1987, for example, 0.47 guilders per kVEM). Thus if a management packet resulted in a decline of 2,100 kVEM per hectare, the decline in returns element of the management compensation would be valued at 987 guilders per hectare (2,100 x 0.47). *See* DIRECTIE BEHEER LANDBOUWGRONDEN, MANAGEMENT AGREEMENTS IN DUTCH AGRICULTURE 17-18 (1987).

180. Beschikking, *supra* note 71, art 31, lid 3; art 32, lid 2.

181. *Id.* arts. 35-49.

measures and on the intensity of farming (in livestock units per hectare) in the initial situation.[182] The management plan establishes the circumstances under which adaptation compensation is available.[183] The plan focuses, for example, on the number of animals on a farm before the management agreement was entered, and the number permitted under the terms of the agreement.[184]

Unlike management compensation, adaptation compensation is calculated for each farm, based on the farmer's operation (for example, the stocking density) in the original situation and the adaptations he must make to comply with the management agreement. The *Beschikking* provides rather complicated formulas for making the calculations.[185] Adaptation compensation may continue for up to eighteen years. At the end of the first and second management periods, the farmer's situation is reevaluated. Then, if necessary, the compensation will be extended for subsequent periods, but at a lower rate.[186]

The management and adaptation compensations are usually paid to the farmer whose business is operated on the land subject to the agreement. In some instances when that farmer is not owner of the land, compensation may also be available for the lessor.[187] This compensation consists of a sum per calendar year, per hectare of land used under a management agreement and leased for at least six years. The sum payable is based on the amount by which the rent in the *Relatienota* area lags behind rent for similar land in the reference area.[188] When the lessor receives compensation, the farmer's payment is reduced accordingly.[189]

Sometimes a management agreement may end because the land involved no longer forms part of a *Relatienota* area[190] or because the parties agree to end it. In such a case, the farmer may be entitled to payment intended to help adapt the farm business to the type of management possible in the reference area. The payment continues for the number of years determined by the Central Committee to be required for the adaptation.[191] In the first calendar year, the payment is identical to the

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182. DIRECTIE BEHEER LANDBOUWGRONDEN, *supra* note 62, at 15-16.

183. Beschikking, *supra* note 71, art. 35, lid 2.

184. *See, e.g.*, *Toelichting*, COMMISSIE BEHEER LANBOUWGRONDEN, BEHEERSPLAN VOOR DE RESERVAATSGEBIEDEN LUTJEGAST-DOEZUM 18-19 (1985).

185. Beschikking, *supra* note 71, arts. 36-49. Article 49 allows some flexibility for instances in which the formulas do not reasonably compensate farmers for their adaptations.

186. *E.g.*, *Toelichting*, *supra* note 184, at 19. In the second period, the farmer will receive 70 percent, and in the third period 40 percent, of the original adaptation compensation.

187. Beschikking, *supra* note 71, art 50, lid 1. If the lessor is a public-law body or a nature protection organization that manages land, the compensation is not available. *Id.* art. 50, lid 2.

188. *Id.* art. 51. The sum is reconsidered annually.

189. *Id.* art. 34.

190. *Id.* art. 58. *See supra* note 154.

191. *Id.* art. 52.

amount the farmer would have received under the management agreement; in succeeding years, the payment is reduced.[192] The lessor may also be entitled to payment for ending the agreement.[193]

b. *Payment under the EC less-favored areas directive*

Part of the compensation received by farmers in *Relatienota* areas may be paid under the *Bergboerenregeling*—the so-called mountain farmer rules or, more accurately, the less-favored areas directive.[194] These regulations are the Dutch implementation of the European Community program designed for farmers in areas with important nature and landscape values.[195] Indeed, the program serves two interrelated goals: to provide financial support to farmers hindered by unfavorable physical circumstances, and to preserve valuable features of the natural environment.[196] Accordingly, regions eligible for less-favored areas support often suffer from natural handicaps that hinder efficient farming. An important condition for receiving payment under this program is maintenance of existing external production circumstances; thus, the handicaps with importance for nature (for example, high water levels), must not be altered. The program requires the passive management often essential in management areas.

Although European Community policy permits a maximum of 190,000 hectares in The Netherlands to qualify for compensation under

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192. *Id.* art. 53.

193. *Id.* art. 54. Lessors who receive compensation pursuant to article 50 of the *Beschikking* are entitled to this payment.

194. This program intended to help farmers in marginal agricultural regions is referred to as mountain-farmer regulations because it was originally intended for farmers in the hilly regions of France, West Germany, and Italy.

195. These are based on Directive 75/268/EEC of 28 April 1975 on mountain and hill farming and farming in less favored areas. *See also* Council Regulation 797/85 of 12 March 1985, Title III, arts. 13-17 (Special measures to assist mountain and hill farming and farming in certain less favoured areas). Revisions to this rule were expected. Council Regulation 1760/87 (15 June 1987) has amended 797/85, in part to encourage conversion and extensification of production. For Dutch implementation, *see* Beschikking bijdragen probleemgebieden, Nr. J. 7398, 1982 Stcrt. 251 (December 22, 1982). For general information on the Dutch implementation of this program, *see* G. BENNETT, APPLICATION OF THE LFA DIRECTIVE IN THE NETHERLANDS, Countryside Commission, CCP 167 (April 1984). Coordination of provisions of the Dutch implementation of the less-favored areas directive with management agreements is simplified by the fact that the BBL (Bureau for Agricultural Land Management) administers both programs.

The Directive, article 3, specifies that the program is applicable in mountain regions, areas in danger of depopulation, or areas with specific natural handicaps. In The Netherlands only the third is applicable, and four broad categories of natural handicaps are recognized. These handicaps include unfavorable hydraulic conditions (e.g., high water table), fragmented field or landownership patterns, isolated location, and poor ground conditions (e.g., infertile soil). Normally the handicaps that qualify for compensation must be permanent and "external"—that is, not caused by the farmer's own agricultural practices. "Internal" practices (e.g., mowing and use of fertilizers) are regulated by management agreements, instead of through the less-favored areas directive program. G. BENNETT, *supra*, at 6, 8-9.

196. *See* G. BENNETT, *supra* note 195, at 10.

bergboeren rules, the Dutch government has not made full use of this opportunity. Initially the government tied the measure to *Relatienota* implementation; only in *Relatienota* areas (and, of these, only in management areas) could farmers qualify for payment.[197] Recently, applicability has been broadened somewhat to include reserve areas with no short-term prospect of acquisition by central authorities. In addition, the *bergboeren* rules may also appply in selected regions with parcels of farmland that cannot be reached by road, but only by water.[198] Compensation for passive management under the Netherlands version of the mountain-farmer regulation is limited to a maximum of 180 guilders per hectare, of which the EC reimburses 25 percent to the Dutch government. Actual compensation is calculated on the basis of the intensity of farming, measured by the number of livestock, expressed in large animal units per hectare. Farmers who receive this compensation must include it as part of their total management payment. Because the two types of payments are based on different systems, such farmers actually enter two separate contracts, one for the *bergboeren* compensation[199] and one for the *beheersovereenkomst.*[200]

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197. Of the 100,000 hectares designated as *Relatienota* areas, only 40,000 are management areas. Thus the mountain-farmer rules could apply to a maximum of only 40,000 hectares. Interview with Drs. P. Slot, Director, Directie Beheer Landbouwgronden (22 July 1987).

In actual practice, far fewer hectares have been declared eligible. By the end of 1986, a surface area of 18,000 hectares in Holland had been placed on the EC list of agricultural problem areas. A further 30,000 hectares have been submitted to the EC for inclusion on the list. By the end of 1986, the *Beschikking bijdragen probleemgebieden* had been declared applicable to 47 areas with a total surface of about 11,500 hectares. Five hundred twenty-eight operators had entered agreements on a total of 3991 hectares. BBL, JAARVERSLAG 1986, *supra* note 99, at 33.

198. BBL, JAARVERSLAG 1986, *supra* note 99, at 32.

199. Contracts entered under these rules run for five years. They specify the land area (by cadastral description and a map) for which the subsidy is being paid, prescribe the amount of the subsidy, and list the natural handicaps that the farmer must not destroy or try to eliminate. In exchange for the annual subsidy, the farmer promises to follow the requirements of the *Beschikking* and to maintain the natural handicaps.

200. It has been speculated that the designation of an area under the LFA program acts to speed up the often-slow process of establishing a management plan. The availability of LFA compensation could encourage farmers also to enter a management agreement. G. BENNETT, *supra* note 195, at 9.

Although all *Relatienota* areas do suffer natural handicaps, the Dutch approach has received criticism. The underuse of the potential number of hectares permitted by the EC means that many Dutch farmers cannot take advantage of the supporting measure provided and subsidized by the EC. This measure was intended, critics say, to support agriculture and not the *Relatienota*. This financial support is needed by farmers in many areas of the Netherlands, for example, where water levels are high. Moreover, if the two programs can be separated so that the *bergboeren* rules are used to pay for passive management, management agreements can assume a more clear role in compensating active management. Hermans & Hazenbosch, *De Relatienota op de helling*, 11 NATUUR EN MILIEU 4, 8 (1987).

Government officials have recognized the need to expand the applicability of the *bergboeren* rules to regions other than management areas. These include reserve land that has not yet been acquired (and for which there is no short-term prospect of acquisition) and

Calculation of compensation for the various aspects of the *Relatienota* program is complicated. In practice, the payments that farmers actually receive under management agreements vary, depending on the provisions of the management plan for the area and, within each area, on the severity of the restraints in the packet chosen by each farmer. An individual farmer may receive between 300 and 1600 guilders per hectare per year, with the average payment per hectare being about 750 guilders.[201] Annual compensation is divided and paid in four installments.[202]

IV. CONCLUSION

The *Relatienota* policy articulated in the mid 1970s has led to a thoughtful program designed to encourage and reward the maintenance of valuable natural elements. Where it has been implemented, the program has proved effective in adapting agriculture to nature values in especially vulnerable areas of The Netherlands. Yet, after more than a decade, relatively little of the ground eligible for protection is actually operated under management agreements or purchased as part of a reserve. When the program was initiated, it was expected that after two years, 10,000 hectares would be operated under management agreements.[203] By March 1987, however, twelve years after the *Relatienota* appeared, only about 7000 hectares were being farmed under *beheersovereenkomsten*,[204] and about 7300 hectares had been purchased as reserves.[205]

A. *Problems with the Program*

1. *A Slow Beginning*

Several factors help to explain the relatively slow beginnings of the program.[206] In part, the complicated nature of the designation procedure itself is to blame.[207] A number of steps are involved in identifying *Relatienota* areas, and establishing definite borders was a time-consuming

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the so-called *vaargebieden*—regions where the farmer cannot reach his land by road from the homestead, but can only get there by water. Further changes in the Dutch program may occur in connection with revisions in EC Council Regulation 797/85. BBL, JAARVERSLAG 1985, *supra* note 89, at 7-8.

201. Interview with P. Scheele and W. de Boer, Directie Beheer Landbouwgronden (3 June 1987). These sums include both management and adaptation compensation, as well as payment under the *bergboeren* provisions. The Bureau spends about 8 million guilders annually for compensation.

202. Beschikking, *supra* note 71, art. 74.

203. Interview with Drs. P. Slot, Director, Directie Beheer Landbouwgronden (22 July 1987).

204. Interview with W. de Boer & P. Scheele, Directie Beheer Landbouwgronden (3 June 1987).

205. Hermans & Hazenbosch, *supra* note 200, at 4.

206. For an explanation in English of some of the initial reactions to the *Relatienota* policy, *see* Fornier, *supra* note 25, 172-78. *See also* Joustra, *supra* note 64.

207. For an explanation of this procedure, *see supra*, text accompanying notes 92-109.

process.[208] Also, the requirement that formal management plans be established prior to conclusion of contracts, although necessary, meant that considerable time would elapse before farmers could be offered the opportunity to participate.[209]

Even when management agreements were available, however, farmers resisted, perhaps from some type of psychological opposition.[210] The special management dictated for *Relatienota* areas demands extensification of agricultural methods, an approach that contradicts the usual production orientation of the farmer. To extensify, the farmer must abandon some of the technical and scientific developments that have led to more intensive land use and efficient production. Adopting lower production standards in the interest of nature and landscape interferes with the farmer's normal management practices and expectations of himself, and can lead to stress.[211]

This psychological opposition included a further element: farmers doubted the expertise, dependability, and credibility of the government. For years government policy had favored intensification, and the Ministry of Agriculture and Fisheries had encouraged farmers to intensify their operations. The new emphasis on extensification gave farmers reason to fear

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208. van de Klundert & van Huis, *Verweving van landbouw en natuur*, in VERWEVING IN HET LANDELIJK GEBIED at 37 (Rijksplanologische Dienst, publikatie 85-4 (1985)). Part of the problem also stemmed from the inability of farmers and nature protection representatives to communicate. This failure resulted in significant delays at the beginning of the process. The developing ability of farmers and nature protectors to communicate has been an important by-product of *Relatienota* policy. Interview with Drs. P. Slot, Director, Directie Beheer Landbouwgronden (22 July 1987). This same observation has been made by Bennett, Annex 3, at 175, in COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 92:

> the instrument's most important achievement may well be political rather than environmental. Prior to the introduction of management agreements, farmers and conservationists saw their interests as irreconcilable. Now, for the first time, an area of common ground has been found. Farming and conservation can only be reconciled if farmers and conservationists learn to negotiate with each other. At least in the Netherlands they are now on speaking terms.

209. This problem is not unique to management agreements in the Netherlands. Cumbersome procedures exist elsewhere, especially when compensation schemes are complicated. COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 13, at 32.

210. Resistance has not been unique to the Netherlands. A multi-national study noted that:

> [f]armers who resist or are critical of management agreements often are most concerned about the long-term restrictions which may be placed on their farms, fearing that they will be left behind technically, may be deprived of a valuable business, may be placing a major burden on their successors, may be severely reducing the value of their own assets, may be becoming "park keepers" rather than independent farmers etc.

COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 13, at 26.

211. Wind, *supra* note 24, at 109-110. The farmer who must avoid mowing, for example, while his neighbors carry out their usual Spring practices, may experience considerable frustration. Farmers dislike agreements because they see them as "curbing their independence, limiting their incomes or even degrading their status toward that of park keepers." COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 13, at 32.

that eventually the government would scale back the promised management compensation.[212] It was difficult for land users to believe that, despite the vagaries of the budget in ensuing years, the government would honor its commitment to pay.[213] Moreover, farmers also believed that their government often acted coercively and consulted too little with the individuals involved.[214] Another fear experienced by farmers was that their efforts to carry out the promised management obligations would be criticized.[215] Still others feared that the value of their land would decrease as a result of limitations on land use in favor of nature.[216]

Furthermore, farmers have expressed opposition on technical grounds. The uniformity and lack of flexibility in the initial stages of the program discouraged participation. Amendments in 1983, however, have led to increasing flexibility and the possibility of a trial year.[217] Some opposition, even to the more flexible system, remains, especially on the part of young farmers who operate intensively. These farmers object to the fact that each farmer who adopts a specific packet of obligations will receive the same compensation, despite the fact that meeting those obligations may be less burdensome for farmers with less intensive operations.[218]

Much of the initial opposition of farmers to the program has diminished. The willingness of some to enter agreements has encouraged others to participate.[219] In addition, nationwide limitations on production of milk and manure have reduced income possibilities for some farmers.[220] Thus, the *beheersovereenkomst* may offer farmers the opportunity to maintain a reasonable income level and to get paid for a new farm product, the conservation of nature.[221] Nonetheless, even with increasing acceptance by farmers, the *Relatienota* program itself raises some unresolved issues that focus in part on effective accomplishment of the

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212. van de Klundert & van Huis, *supra* note 208, at 38.

213. Wind, *supra* note 24, at 110.

214. van de Klundert & van Huis, *supra* note 208, at 38.

215. Wind, *supra* note 24, at 110.

216. de Boer, *supra* note 157, at 94.

217. van de Klundert & van Huis, *supra* note 208, at 38.

218. *See* Wind, *supra* note 24, at 116. This objection may be misdirected. Management compensation is intended to pay for the realization of specific goals. The more flexible adaptation compensation is designed to recognize individual farmers' difficulties in meeting those goals. *Id.*

219. By May 1987, this encouragement was widespread. A management agreement was entered by the thousandth farmer. The government attributed the increasing interest to more farmer involvement in establishing management plans, the possibility of a trial year, and the problems of agricultural surpluses. Nonetheless, further study is planned to simplify both decisionmaking about identification and definite bordering of areas and regulation of the management agreements. Ministerie van Landbouw en Visserij, Persbericht, nr. 154, 8 mei 1987.

220. *See supra* notes 173-74.

221. Interview with W. de Boer and P. Scheele, Directie Beheer Landbouwgronden (3 June 1987).

nature conservation goals of the *Relatienota*.

2. Accomplishing Nature Protection Goals

One practical problem relates to the design and implementation of the desired management practices. It is often difficult to identify a level of management that will make a real contribution to the maintenance of landscape and nature values, and at the same time realistically fit within the framework of farming in the *Relatienota* area. Stringent requirements, which would really protect nature values, may well be unacceptable to farmers and result in no participation and thus no protection. Even when acceptable management packets are designed, some element of compromise remains. The fact that each farmer may choose to implement practices that fit in his business means that no real integrated management for the whole area is likely.[222]

The fact that participation in the *Relatienota* program is voluntary remains a significant issue because it makes *beheersovereenkomsten* particularly vulnerable. The desired nature protection will occur only when individuals are willing to enter contracts.[223] One may question whether it is wise to tie essential nature protection efforts to private contracts with individuals, when those individuals are free to reject participation. A positive aspect of this voluntary approach, however, is that the individuals who decide to enter management contracts are likely to be particularly careful in carrying out their responsibilities.[224] Moreover, there may be a subtle element of coercion even in the voluntary program. Insufficient cooperation with *Relatienota* efforts may well result eventually in the imposition of protection on especially vulnerable land through another, involuntary program.[225]

Closely connected with the problem of voluntary management agreements is the difficulty of forming reserve areas when land can be purchased for reserves only when the owner is willing to sell.[226] Under this system, reserve areas (especially large ones) may take a considerable number of years to purchase. Moreover, the transition period poses difficulties for both the land user and for nature interests. Given the characteristics of areas designated as reserves, production circumstances are likely to be inefficient, with little prospect of adopting new technology.

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222. Wind, *supra* note 24, at 115-117.

223. *See* Brussaard & van Wijmen, *supra* note 9, at 176. Indeed, this aspect may mean that areas farmed by young dynamic farmers, who will be reluctant to restrict activities, will lack protection, even if those areas are particularly sensitive. COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 13, at 32.

224. Heida, *Scheiding en verweving. De boer en het landschapsbeheer*, 35 ARS AEQUI 99, 101 (1986).

225. Wolff, *De toepassing van de Natuurbeschermingswet op landbouwgronden*, 45 AGRARISCH RECHT 451, 459 (1985). For example, particularly valuable land could be identified and protected as a natural monument. *Id.*

226. The situation is somewhat different in land development projects under the *Landinrichtingswet*.

But at the same time, even with the possibility of transitional management agreements, it may be difficult to ask landowners to carry out intrusive nature protection measures in an area designated as a reserve, especially when those measures do not adapt well to the business management.[227]

A related problem is the issue of continuity of nature protection, especially in management areas. Normally *beheersovereenkomsten* are entered for six-year management periods. Although it is difficult for the government to end an agreement, the land user can ask to terminate the contract. Thus, after any contract period, the needed management can again be lost. Moreover, although the buyer of land must agree to continue an existing contract, he too is free to terminate at the end of the contract period. One can well ask what purpose there is in protecting a vulnerable area only temporarily.[228] A partial answer to that question may be that a more permanent commitment to nature protection demands far more than most farmers are willing to risk. This unrealistic expectation would diminish confidence in the *Relatienota* instrument.[229]

The cost of implementation of *Relatienota* policy is high. Both management areas and reserves involve significant government expenditures. Management contracts require annually-adjusted payments of the agreed compensation to farmers.[230] The creation of reserves requires an initial payment to purchase the land, plus continual expenditures to exploit and manage ground that is purchased and retained by the government. Because reserves form a majority of *Relatienota* areas, these costs are burdensome.[231]

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227. Wind, *supra* note 24, at 114.

228. *See* Heida, *supra* note 224, at 103.

229. Wind, *supra* note 24, at 110.

A further problem, identified by some, is the lack of legal support for *Relatienota* policy. That is, the policy is implemented through the *Beschikking*, rather than through a law (*wet*) enacted after parliamentary treatment. *See e.g.*, Joustra, *supra* note 64, at 120. A draft of the *Wet beheer landbouwgronden*, designed to provide this legal basis, was circulated in 1984, and later revisions were made. In 1986 a draft was sent to the Council of State for advice. BBL, JAARVERSLAG 1986, *supra* note 99, at 25. Although such a law could offer a foundation for management of valuable agricultural cultural landscapes, Brussaard & van Wijmen, *supra* note 9, at 177, in the current situation, it is not entirely clear that the bill will be enacted in the near future. Nor is it entirely clear that such a law will contribute much more to implementation of the policy, given the fact that operation under the *Beschikking* is now working rather well. It is likely, however, that the *Beschikking* will be amended to some extent, even if a law is not enacted.

230. For information on proposed changes, *see* Bruil, *Wetgeving en literatuur*, 48 AGRARISCH RECHT 124, 126 (1988). The proposed changes would simplify the process of establishing *Relatienota* areas, reduce the number of management obligations, and standardize the compensation system. These payments currently amount to about 8 million guilders per year, but are expected to be over 12 ½ million in the early 1990s. Interview with W. de Boer & P. Scheele, Directie Beheer Landbouwgronden (3 June 1987).

231. Interview with Drs. P. Slot, Director, Directie Beheer Landbouwgronden (22 July 1987). Land purchased for reserves has cost an average of about 25,000 guilders per hectare, with the most expensive costing Hfl 57,000. About half of the reserve land is retained by the

B. *Management Agreements and Physical Planning*

One of the most difficult problems connected with the system of *beheersovereenkomsten* is their relationship with the *bestemmingsplan*, the municipal land-use plan that forms an integral part of the physical planning system. The Physical Planning Act[232] authorizes a comprehensive system of planning, carried out in a decentralized, but coordinated, manner by the central government, provinces, and municipalities. Central government policy normally influences provincial regional plans (*streekplannen*), which outline in general terms the future spatial development for each province. Municipalities[233] may issue stucture plans to outline the expected development of the area. In addition, allocation or land-use plans (*bestemmingsplannen*) establish the prescribed use of land within the plan areas. Land-use plans are directly binding on citizens, who are forbidden to change the use of their land to a function inconsistent with the plan designation.

Municipalities include rural areas, and for these areas a land-use plan, similar to a zoning plan, is mandatory.[234] The plan normally specifies a destination or use (*bestemming*) for each land parcel. There must be pressing justification for a use designation that limits the most effective use of the land, and the plan can make no demands in connection with the structure of agricultural businesses.[235] Several different use designations are possible in rural areas. Among these are agricultural, agricultural with natural-scientific and/or landscape values, or nature areas.[236] To maintain these values, the plan can impose use restrictions and require permits before specific activities can be carried out. For example, it is possible to restrict activities like converting grassland to cropland, cutting valuable stands of trees, or lowering the groundwater level. In a nature area, a permit can be required for the use of pesticides and fertilizers.[237]

Thus, although land-use plans cannot enforce a specific agricultural management directly, their provisions can influence that management indirectly. For example, a provision that grassland cannot be plowed without a permit will help to ensure that the land remains as grassland.[238]

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government (for example, the *Staatsbosbeheer*—Forestry Service) for exploitation.

232. Wet op de Ruimtelijke Ordening, 5 juli 1962, Stb. 286, effective 1 August 1965; current version, 21 nov. 1985, Stb. 623, 624, 625 (Ned. Staats. 64 (1986)).

233. There are about 800 municipalities (each called a *gemeente*), which include built up areas and also contiguous rural areas.

234. Wet op de Ruimtelijke Ordening, art. 10, Ned. Staats. 64 (1986). In principle, thus, the whole countryside should be subject to land-use plans; in practice, however, all municipalities have not yet developed their plans. van de Klundert & van Huis, *supra* note 208, at 38-39.

235. *See* Enter, *Relatienota en Bestemmingsplan*, 41 DE PACHT 99, 99 (1981).

236. *See* van de Klundert & van Huis, *supra* note 208, at 39.

237. *See* van de Klundert & van Huis, *supra* note 208, at 40-41; Enter, *supra* note 235, at 104-05.

238. Enter, *supra* note 235, at 100.

Often the restrictions that are possible through the land-use plan focus on the maintenance of existing external production circumstances. They require the farmer to forego developments that could enhance farm productivity, and thus to give up the possibility of higher income.[239] In the vast majority of instances, the farmer receives no compensation when these restrictions are imposed. Although the Physical Planning Act includes an article that authorizes payment of compensation in cases in which a landowner sustains damage that he cannot reasonably be expected to bear,[240] these provisions are rarely used.[241] Moreover, it probably is not their intention to legitimize compensation for passive measures that merely maintain the status quo.[242]

The fact that the *bestemmingsplan*, like the *beheersovereenkomst*, can require the maintenance of existing production circumstances (that is, passive management) is the source of some difficulties and possible confusion.[243] Inconsistent treatment of land users in similar situations is one problem. A type of passive management may be required in one locality by the terms of the *bestemmingsplan*, while in an adjoining area (a *Relatienota* area) similar management limitations may be carried out voluntarily under management agreements.[244] The type of management limitations permissible under the land-use plan may vary with the type of area, with more restrictions possible, for example, in a nature area.[245] Even so, however, the farmer in the first area is entitled to no compensation, while the other farmer receives management compensation. Another difficulty may occur when a specific *Relatienota* area is also subject to limitations imposed through a land-use destination in a *bestemmingsplan*. Such a situation poses the risk of overlapping requirements or

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239. For the view that land-use plans offer little real protection in rural areas, *see* van Schaik & Wingens, *Bestemmingsplannen bieden buitengebied geen bescherming*, 11 NATUUR EN MILIEU 10 (1987).

240. *See* Wet op de Ruimtelijke Ordening, art. 49, Ned. Staats. 64 (1986). *See generally* van Wijmen, *Beheersvergoeding en schadevergoeding*, 42 AGRARISCH RECHT 128, 131-32 (1982).

241. Interview with Drs. P. Slot, Director, Directie Beheer Landbouwgronden (22 July 1987).

242. van de Klundert & van Huis, *supra* note 208, at 39-40.

243. Enter, *supra* note 235, at 100, raises several questions: to what extent can special management conditions in connection with the presence of natural-scientific and landscape values be imposed in the *bestemmingsplan*? what rules belong in the *bestemmingsplan* and what in the *beheersovereenkomst*? is it possible to put rules in the *bestemmingsplan* that belong in the *beheersovereenkomst* (and vice versa), and if so, is it possible to choose between management compensation and payment for damages under the Physical Planning Law?

To suggest answers to these questions is beyond the scope of this article.

244. There may be a question about what *bestemming* or destination is appropriate for land in a *Relatienota* area. Enter, *supra* note 235, at 107, suggests that management areas should be called "agricultural regions with (high) natural-scientific and/or landscape value". Reserves, after purchase, should be called "nature areas".

245. *See* Heida, *supra* note 224, at 102.

perhaps inconsistent rules.[246]

One result of these problems is the "no pay-no cure" phenomenon: a tendency of provincial regional plans not to require protection of nature and landscape if there is no opportunity for land users to enter management agreements and receive compensation for their efforts. Some provinces have adopted the attitude that outside *Relatienota* areas, there is no possibility or necessity to protect nature values by the system of construction permits made possible by physical planning law.[247] In other instances, it was felt that limitations imposed through physical planning will be accepted only if citizens have the opportunity to receive compensation for unreasonable harm, including the harm imposed by the requirement to maintain the present situation.[248] These attitudes are inconsistent with the intentions of physical planning law.

In fact, both physical planning law and *Relatienota* policy are needed to protect vulnerable natural areas. The number of hectares of valuable cultural ground in The Netherlands is far greater than the *Relatienota* alone can protect.[249] Therefore, most of these areas can only be protected through limitations imposed in land-use plans. Moreover, the nature of land-use plans and management agreements is different. Land-use plans are public-law instruments that bind all citizens, whereas management agreements are private-law contracts. It was never intended that management agreements take over the normal role of land-use plans,[250] or that their implementation should cause confusion. Instead, they should provide primarily for activities that go beyond the passive management normally imposed by the *bestemmingsplan*, thus avoiding a situation in which land can be subject to identical or conflicting regulation from two different legal regimes.[251]

C. *Concluding Remarks*

The designation of *Relatienota* areas, combined with the conclusion of management agreements and eventual purchase of land to form reserves, must be seen as one component of the many efforts in The Netherlands to protect and preserve valuable natural areas. The comprehensive system of physical planning and the equally complex process of land development, plus a number of other laws and administrative programs, also play significant roles in these efforts.[252] The careful manage-

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246. Heida, *supra* note 224, at 102. When a *Relatienota* area is proposed, it must be tested against the provisions of the provincial *streekplan*. Municipalities and other governmental bodies are also informed. *Id.* Thus, some coordination can be expected.

247. van de Klundert & van Huis, *supra* note 208, at 40.

248. *Id. See generally* Bos, *Ervaringen in het grensvlak van bestemmingsplan en natuurbeheer*, 42 AGRARISCH RECHT 142 (1982).

249. van de Klundert & van Huis, *supra* note 208, at 41.

250. *See* Enter, *supra* note 235, at 100.

251. Enter, *supra* note 235 , at 108.

252. For information about aspects of other laws designed in part to protect nature and

ment of a small percentage of the valuable agricultural landscapes in The Netherlands will not preserve the whole natural environment. Nor will the financial compensation offered through management agreements suffice to solve all the problems of farmers whose land suffers from special and therefore valuable geographic handicaps.

Nonetheless, the Dutch implementation of *Relatienota* policy, especially through conclusion of private-law contracts with committed landowners, can be viewed as a model of cooperation between government, farmers, and nature protection interests. And it is expected that heightened concern about the environmental consequences of agriculture, along with other factors, will lead to increased use of these instruments in The Netherlands, as in other nations.[253] The use of *beheersovereenkomsten*, voluntarily entered by land users, is an effective example of the flexibility that private contracts can offer in achieving societal goals. These contracts provide a means of guaranteeing profits to farmers in less than optimal circumstances, while at the same time maintaining the values of nature and rural landscape.[254] It is to be hoped that continued cooperation by farmers and government will increase participation in the *Relatienota* program and ensure the survival of the most valuable natural areas in The Netherlands for future generations. Moreover, the lessons of *Relatienota* policy and its careful implementation in The Netherlands may well serve as a catalyst and model for other member states of the European Community.

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landscape, see e.g., Brussaard & van Wijmen, *supra* note 9; Wolff, *supra* note 225; van de Klundert & van Huis, *supra* note 208.

253. COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 13, at 36-37.

254. *See* Fornier, *supra* note 25, at 178.

CRITICAL ESSAY

A Survey of the International Law of Rivers*

I. INTRODUCTION

The oldest legal theories for acquiring rights in international rivers are absolute territorial sovereignty, absolute territorial integrity and prior use. Absolute territorial sovereignty and integrity are based on the "arbitrary" consideration of the states' boundaries to determine respective rights in the use of the river. Prior use is premised on the notion that first in time is first in right. These three principles have become controversial in the international community as river use has increased because they primarily focus on the effect of the river use in only one state, disregarding injurious effects to other riparians.

The increased interaction and interdependency of nations has forced international river law to be more responsive to the conflicting interests of co-riparians. The initial response to conflicting claims was to resort to the theory of no substantial harm and its related principles. These principles are significant because they address possible harmful effects upon non-riparian water users. As these principles became more established, they led to the principle of equitable utilization.

Equitable utilization evaluates all relevant factors in determining the legality of a particular use. Because all factors are considered, disputes can be resolved more effectively. As an emerging factor in equitable utilization, optimal use seeks the most economically rational solution and use, rather than the most equitable result. However, optimal use is usually consistent with the most equitable use. If the river's most efficient use is employed there will be increased benefits to share equitably.

This article surveys the legal theories applicable to the resolution of international river[1] disputes. The article's scope is limited to examining

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* The authors wish to dedicate this article to William White, Esq., who coached the 1987 Jessup Moot Court Team, and to Professor John A. Carver, Jr., who will be retiring at the end of the 1987-88 academic year after years of service at the College of Law.

1. "An international river is one either flowing through the territory of more than one state, sometimes referred to as a successive river, or one separating the territories of two states from one another, sometimes referred to as a boundary or contiguous river. . . . While there is little authority on the point, international law does not draw legal distinc-

non-navigational issues of river usage such as damming and drainage for irrigation. Issues of international water pollution will not be addressed.[2] The principles of international river law that will be surveyed are absolute state sovereignty, absolute territorial integrity, prior use, no substantial harm, equitable utilization and optimal use.[3] The article will begin with a discussion of the historical development of international river law including absolute state sovereignty, absolute territorial integrity and prior appropriation. Part III will address the principles which prohibit harmful use of a watercourse. Parts IV and V will examine equitable utilization and optimal use. Finally, this article will conclude with a practical comparison of equitable utilization and optimal use.

II. HISTORICAL DEVELOPMENT OF INTERNATIONAL RIVER LAW

A. *The Principle of Absolute State Sovereignty*

Historically, the exercise of state sovereignty permitted the unrestricted use of natural resources within a sovereign state.[4] For example, suppose State A is upstream of State B. State A may lawfully deplete a river's flow within it's territory. Any resulting reduction or elimination of a river's flow into State B is irrelevant to a determination of the legality of State A's conduct. Even if a river used by a state within its territory substantially injures a neighbor, it is legal under the principle of absolute territorial sovereignty.

The principle of absolute territorial sovereignty is referred to as the Harmon doctrine. In 1895, United States Attorney-General Harmon applied the concept of state sovereignty in connection with a river dispute between the United States and Mexico concerning the utilization of the

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tions between contiguous rivers and successive rivers. Such authority as has been found supports the view that the same rules of international law apply to both types of rivers." J. Lipper *Equitable Utilization*, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 16-17 (Garretson, Hayton, Olmstead eds. 1967); 1 D. O'CONNELL, INTERNATIONAL LAW 616 (2d. ed. 1970).

2. For the purposes of this article, detrimental changes in a river's flow, though not pollution in the common sense of the word, will be considered as a form of environmental harm. Therefore, certain works on international water pollution are cited in that context.

3. Principles or concepts that have been proposed by the international legal community concerning international watercourses include: absolute territorial sovereignty/integrity, coherence, community interest of riparian States, community of States, equality of right, equitable apportionment (utilization), equitable participation, good faith, good neighbourship, mitigated-no-substantial-harm, non-discrimination, no specific substantive law, no substantial harm, optimal use, peaceful co-existence, permanent sovereignty over natural resources, prior appropriation or use, *res communis*, restricted territorial integrity/sovereignty, *sic utere tuo ut alienum non laedus*, solidarity, state responsibility, prohibition of abuse of rights, and requirement of integrated approach, etc. J.G. Lammers, 1 *Balancing the Equities in International Environmental Law* in THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT 154 (Dupey ed. 1984).

4. H. BRIGGS, THE LAW OF NATIONS 274 (2d. ed. 1952); 1 L. OPPENHEIM, INTERNATIONAL LAW; 464-65 (8th ed. H. Lauterpacht 1955).

Rio Grande.[5] In giving advice to the Secretary of State, Attorney-General Harmon declared;

> The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department; but this question should be decided as one of policy only, because in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.[6]

This classical formulation of the principle of absolute state sovereignty, has since become known as the Harmon doctrine.[7]

The Harmon doctrine has been espoused by many international publicists,[8] and support can be found in the pronouncements of several nations. Austria and India[9] have acknowledged the Harmon doctrine in disputes with down stream neighbors.[10] However, Bourne does note "like the United States, both countries have settled the waters disputes with their neighbors by treaties based on other principles but expressly providing that the treaty provisions did not establish any general principle of law or precedent."[11]

Despite some support for the Harmon Doctrine,[12] it has been nearly universally rejected. A 1958 memorandum of the United States State Department stated that:

> Well over 100 treaties which have governed or today govern systems of international waters have been entered into all over the world. These treaties indicate that there are principles limiting the power of states to use systems of international waters without regard to injurious effects on neighboring states. These treaties restrict the freedom of action of at least one, and usually of both or all, of the signatories with regard to waters within their respective jurisdictions. The number of states parties to these treaties, their spread over both time and geography, and the fact that in these treaties similar problems are resolved in similar ways, make of these treaties persuasive evidence of law-creating international customs.[13]

More recently, professor Bourne writes:

> Not only do the vast number of water treaties bear witness against it:

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5. Treaty Between The United States and Mexico, May 21, 1906, 34 Stat. 2953, T.S. No. 455, 9 Bevans 924.

6. 21 Op. Att'y Gen. 274 (1895); *see also* 1 Moore International law Digest 653-54 (1906).

7. *See* J. LAMMERS, POLLUTION OF INTERNATIONAL WATERCOURSES 268 (1984).

8. *See Id.* at 531-533; *see also* F. BERBER, RIVERS IN INTERNATIONAL LAW 15-19 (1959).

9. *See also* Bains, *The Diversion of International Rivers*, 1 INDIAN J. INT'L L. 38 (1960).

10. Bourne, *The Right to Utilize the Waters of International River*, CAN. Y.B. INT'L L. 187, 205 (1965).

11. *Id.*

12. *Supra* note 9.

13. U.S. DEP'T STATE, LEGAL ASPECTS OF INTERNATIONAL WATERS 63 (1958).

> all of the international and federal judicial tribunals that have experience with interstate water problems have rejected it; all of the learned associations, institutes, and other bodies which have studied these problems have rejected it in their statements of principles; and a large majority of the authors, among them some of the most respected and influential jurists, have found it, in professor H. A. Smith's phrase, an "intolerable" doctrine that is radically unsound.[14]

J. Lipper suggests that the Harmon Doctrine is an empty concept and not a principle of law:

> . . . the Harmon Doctrine was not an expression of international law. Rather, it was an assertion that, there being no rules of international law which governed, states were free to do as wished. No subsequent development of the principle supports its inclusion as a part of the law of international rivers.[15]

From a theoretical perspective, J. G. Lammers attacks the Harmon doctrine for being highly egotistic and also, from a legal point of view, self-contradictory.

> It is clear that the unrestricted disposal by State A of the waters of an international watercourse flowing from that State into State B based on the idea of State A's absolute territorial sovereignty is incompatible with the unrestricted disposal of those waters to which State B would be likewise entitled on the basis of its absolute territorial sovereignty over the natural resources which nature would ordinarily bring into its territory . . . . Unlimited disposal by State A of its territory will make the unlimited disposal by State B of its territory impossible and *vice versa*. Thus, if not already untenable because of the social and economic injustice to which the application of the principle of absolute territorial sovereignty would lead, such application would already seem impossible because of the legal contradiction inherent in the principle itself.[16]

B. The Principle of Absolute Territorial Integrity

The antithesis of the Harmon doctrine is the principle of absolute territorial integrity. Under this principle, the exercise of territorial sovereignty is permitted only in so far as it does not cause damage or injury in the territory of other states, as such an exercise would lead to an infringement of the territorial sovereignty of those other states.[17] To illustrate, assume State B is downstream of State A. State A would be prohibited from using the waters within its boundaries in a manner detrimental to State B. Likewise, State B would be prohibited from using the waters within its boundaries in a manner detrimental to a state downstream of

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14. Bourne, *supra* note 10, at 209.
15. Lipper, *supra* note 1, at 22-23.
16. LAMMERS, *supra* note 7, at 557-558.
17. *Id.* at 562.

State B. A detrimental use is any diversion of water that increases or diminishes a river's flow.[18]

The Institute of International Law in its 1979 Athens Resolution[19] and some international publicists adhere to the principle of absolute territorial integrity.[20] However, treaties and state practice do not indicate acceptance of the principle.[21] The absence of the principle of absolute territorial integrity in state practice might be explained by its unjust result. Another, explanation might be the natural inclination of upstream states to take advantage of their upstream location.

C. *The Principle of Prior Use (Appropriation)*

The principle of prior use protects fully the use which existed prior in time.[22] No other considerations are relevant under the principle of prior use in international law.[23] The state that first makes use of a certain quantity of a river's waters has a right to the continued use of that quantity of water. Like the principles of absolute territorial sovereignty and absolute territorial integrity, the principle of prior use often results in unjust uses. Consequently, it is not surprising that there is little support in the international community for the principle of prior use.[24] However, many publicists indicate that international law demands compensation for injury to an existing use.[25]

III. PRINCIPLES PROHIBITING A RIPARIAN'S USE OF A WATERCOURSE THAT CAUSES SUBSTANTIAL HARM TO OTHER RIPARIANS

The principles of neighbourship law, *sic utere tuo ut alienum non laedas*, and restricted territorial sovereignty and restricted territorial in-

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18. BERBER, *supra* note 8, at 20-22.

19. The Preamble of the 1979 Institute of International Law (I.I.L.) Athens Resolution recalls "the obligation to respect the sovereignty of every State over its territory, as a result of which each State has the obligation to avoid any use of its own territory that causes injury in the territory of another state," in 1979 I.I.L. Y.B. Vol. 58, Part II at 196-203.

20. *See* BERBER, *supra* note 8, at 19-22.

21. *See* Lipper, *supra* note 1, at 20.

22. LAMMERS, *supra* note 7, at 364.

23. The principle of prior use in international law is different from the principle of prior use in United States law, which emphasizes the elements of intent to use, a diversion with due diligence, application to a beneficial use, and, of course, priority. *See generally*, Irwin v. Phillips, 5 Cal. 40 (1855); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

24. LAMMERS, *supra* note 7, at 366; Lipper, *supra* note 1, at 57; *but cf.* "Historic uses and priority of appropriation have, in many cases, come to have almost sacred significance, irrespective of the actual benefits derived, or whether the water is being put to the best use." Integrated River Basin Development 38, U.N. Doc. No. E/3066 (1958).

25. *See* R. ZACKLIN & L. CAFLISH, THE LEGAL REGIME OF INTERNATIONAL RIVERS AND LAKES 311 (1984). Additionally, prior use is a significant factor in the settlement of a river dispute under the principle of equitable utilization. *See infra* note 65 and accompanying text; *see also* Lipper, *supra* note 1, at 30.

tegrity prohibit a riparian's use of a river that causes substantial harm to a co-riparian.

A. *The Principle of Neighbourship Law*

The principle of neighbourship law obliges a state to abstain from conduct that causes physical harm to another state.[26] In order to enable states to coexist while at the same time use transboundary natural resources within their boundaries, the principle of neighbourship law also involves a duty to tolerate, to a certain extent, harmful effects caused by activities not in themselves unlawful, undertaken in neighboring states. However, under this principle no state may inflict substantial damage on another.[27] The principle of neighbourship law is solemnly anchored to the Preamble of the Charter of the United Nations,[28] which states: "And for these ends to practice tolerance and live together in peace as good neighbors."[29]

B. *The Principle of Sic Utere Tuo ut Alienum Non Laedas*

The principle of *sic utere tuo ut alienum non laedas* (use your property so as not to injure your neighbor) limits a state's actions to the degree such actions injure another state. There is a divergence in academic views as to the point at which an injury becomes unlawful under *sic utere*.[30] Most commentators agree that it prohibits river use that causes substantial harm.[31] The obligation of *sic utere* is inherent in the concept of territorial sovereignty, a duty correlative to the right of sovereignty jurisdiction.[32] The principle of *sic utere* has been accepted as a basis for establishing state liability by the International Law Association's Helsinki Rules,[33] by many eminent publicists,[34] by at least two International Arbi-

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26. *See generally* FAUCHILLE, TRAITE DE DROIT INTERNATIONAL PUBLIC, pt. 2 (8th ed. 1925).

27. VERDROSS, VOELKERRECHT 292-94 (Vienna; Springer Verlag 5th ed. 1964); THALMANN, GRUNDPRINZIPIEN DES MODRIEVEN ZWISCHENSTAATTLICHEN ZWISCHENSTAATLICHEN NACHBARRECHTS, 151-52 (Zurich; Polygraphyscher Verlag 1959); *cf.* Huber, "Ein Beitrag Zur Lehre Von der Gebietshoheit an Grenzflussen", *see* 1 ZVB 1907 163-164, 175-194 (1907), for the view that any detrimental interference with the physical conditions in a neighboring state is unlawful unless it is insignificant and does not affect important interests.

28. VERDROSS, *supra* note 27.

29. U.N. Charter, *done at* San Francisco, June 26, 1945, *entered into force* for the United States, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1043, *reproduced in* Basic Documents in International Law and World Order 6-7 (Weston, Falk and D'Amato ed. 1980).

30. LAMMERS, *supra* note 7, at 571.

31. *See id.*

32. Mannes, Water Pollution in International law, U.N. Doc. *Water Poll/Conf./* 12, 1521 (1960).

33. International Law Association, Report of the 52nd Conference, Helsinki, 1966, [hereinafter cited as Helsinki Rules] Comment on art. 10, at 496 (1967).

34. *E.g.*, L. OPPENHEIM, INTERNATIONAL LAW 474-475 (8th ed. H. Lauterpacht 1955); B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS

tration Tribunals,[35] and by the International Court of Justice on at least one occasion.[36] Further support for the principle is evidenced by the International Law Commission of the United Nations studying "international law for injurious consequences arising out of acts not prohibited by international law," who's work had been based on *sic utere*.[37]

C. *The Principle of Restricted Territorial Sovereignty and of Restricted Territorial Integrity*

The principle of restricted territorial sovereignty and of restricted territorial integrity is a hybrid of the principles of absolute territorial sovereignty and absolute territorial integrity, that achieves a middle ground between the extremes of the latter two principles.

> This practice of states as evidenced in the controversies which have arisen about this matter, seems now to admit that each state concerned has a right to have the river system considered as a whole, and to have its own interests weighted in the balance against those of other states; and that no other state may claim to use the waters in such a way as to cause material injury to the interest of another, or to oppose their use by another state unless this causes material injury to itself.[38]

B. Winiarski,[39] former judge on the International Court of Justice, writes:

> Let us take the matter further. If a river, whether or not navigable, traverses or separates two or more states, each of the riparian states sovereignty on the section of the river which within its territory; but in using this section it must respect the rights of its neighbors: it is one of the general principles of law elaborated by Roman jurists for the *praedia vicina* the reception of which by international law was equally entirely natural.[40]

The principles of restricted territorial sovereignty and of restricted territorial integrity are considered by many eminent publicists to be a generally adopted rules of international law governing the rights of co-riparians to international rivers.[41]

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121 (1953).

35. *See* Trail Smelter Arbitration (Can. v. U.S.) 35 AM. J. INT'L L. 684, 716 (1941), *see also* Lake Lanoux Arbitration (France v. Spain) 53 AM. J. INT'L L. 156 (1959).

36. Corfu Channel Case (United Kingdom v. Albania) 1949 I.C.J. 9, 23, 43 AM. J. INT'L L. 558 (1959).

37. Margraw, *Transboundary Harm: The International Law Commission's Study of "International Liability."* 80 AM. J. INT'L L. 558 (1986).

38. J. BRIERLY, THE LAW OF NATIONS 204-206 (1955).

39. From Poland, Justice B. Winiarski was a member of the I.C.J. from 1946-1967, and served as its President from 1961-1964.

40. BERBER, *supra* note 8, at 30-31, quoting B. Winiarski, *Principes Generaux du Droit Fluvial International*, (Reccueil des Cours, III, P.81 (1933).

41. *See id.* at 25; Griffin, *The Use of Waters of International Drainage Basins Under Customary International Law*, 53 AM. J. INT'L L. 50, 77-79 (1959); L. TECLAFF, THE RIVER

D. *The Relationship Between the Principles of Neighbourship Law, Sic Utere Tuo ut Alienum Non Laedas and Restricted Territorial Sovereignty and Restricted Territorial Integrity*

The principles of neighbourship law, *sic utere tuo ut alienum non laedas* and restricted territorial sovereignty and restricted territorial integrity share the basic concept that a riparian may not use a river so as to substantially injure a co-riparian. Although the three principles have distinct rationales, upon application, the ultimate result of each is similar. A river use that causes substantial harm to a co-riparian is unlawful under all three principles,[42] the harm outweighs equitable reasons in favor of that use. Whether a river use is lawful under these three principles is decided by a determination of the degree of the harm caused to a riparian state.

These three principles are related to one another by the basic concept that a riparian should not injure a co-riparian. Given this relationship, these principles can be coupled to provide a broader rationale for the duty not to injure a co-riparian.

> [v]arious writers have based their arguments both on the infringement of the territorial integrity of the victim State as well as on the breach of an obligation imposed by good neighbourship. [cite omitted] The first approach appears to lay the emphasis on the infringement of a subjective international right of the victim State - i.e., the territorial sovereignty of that State over its territory - while the second approach appears to assume the existence of rule and principles of objective international law which by imposing restrictions on the exercise and enjoyment of the territorial sovereignty of neighbouring States purport to enable their coexistence.[43] [cite omitted]

A similar analogy can be made of the relationship between the principle of restricted territorial sovereignty and neighbourship law. The principle of restricted sovereignty lays emphasis on the exercise of a subjective international right of the state using the waters - i.e., the territorial sovereignty of that state over its territory - while the principle of neighbourship law assumes the existence of rules and principles of objective international law which impose a duty on neighboring states to tolerate a certain degree of use by a riparian.

The above principles are in turn related to the principle *sic utere*. "The principle of *sic utere* is anchored to the principle of good neighbourship."[44] Since the principle of restricted territorial sovereignty and restricted territorial integrity are related to the principle of neighbourship law, the principles of restricted territorial sovereignty and

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BASIN IN HISTORY AND LAW (1967); Utton, *International Streams and Lakes*, in 2 Waters and Water Rights 402 (Clark ed. 1967).

42. LAMMERS, *supra* note 7, at 562-72.

43. *Id.* at 563.

44. VERDROSS, *supra* note 27, at 132.

restricted territorial integrity are in turn related to the principle of *sic utere*. The three principles can be applied in unison to judge a river use. The result of such an application of these principles would be to treat any use of a river that substantially harmed a co-riparian as unlawful.

There appears to be much support among publicists for the proposition that a riparian should not use a river so as to injure a co-riparian and much support as an accepted principle of international law. The general rules for the utilization of international rivers "are to be found among the rules of international customary laws . . . ."[45] The basic rule may be said to express the duty to use river waters in a manner which is not detrimental to the interest of other riparian states."[46]

> There is ample authority for the proposition that a state can utilize the waters in its territory if its doing so will cause no injury to co-riparians . . . . This view is echoed in the 1961 Salzburg Resolution of the Institute of International Law, . . .; in the 1933 Declaration of Montevideo; and in the 1957 Buenos Aires Resolution. It is also consistent with the basic assumptions underlying the 1958 New York Resolution of the International Law Association. In fact, it is explicit or implicit in most recent writing on international rivers, and it has recently been strongly supported in the Lake Lanoux[47] case between France and Spain[48] in 1957.[49] [cites omitted]

Further support is evidenced by United Nations declarations and conferences. At the United Nations Conference on the Human Environment held in Stockholm,[50] attended by most nations of the world,[51] they found that "the principle of responsibility of one State for damage caused

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45. F. SORENSON, MANUAL OF PUBLIC INTERNATIONAL LAW 329 (1968).

46. *Id.* at 301.

47. France v. Spain, 24 I.L.R. 88 (1957). Although the issue before the Lake Lanoux Tribunal was one governed by treaty law, the Tribunal made statements concerning the substantive law of water courses. The Lake Lanoux case is the leading case on the development of international river law. *See* LAMMERS, *supra* note 7, at 508-517.

48. "It should be noted. . . that even though Spain was claiming a right of veto over French projects, she admitted in her Counter-Memorandum that 'A state has the right to utilize unilaterally that part of a river which runs through it so far as such utilization is of a nature which will effect on the territory of another State only a limited amount of damage, a minimum of inconvenience, such as falls within what is implied by good neighbourliness.' " Bourne, *supra* note 10, at 210.

49. *Id.* at 188-89.

50. U.N. Doc. A/Conf./48 C.R.P. 26, 1972.

51. The resolution was adopted by a vote of 112 to 0, with 10 abstentions. "It has been approved by the General Assembly's Second Committee by a vote of 111 to 0, with 11 abstentions. Abstaining votes were cast by Eastern bloc countries. A probably representative explanation of the non-substantive grounds for abstention by these countries may be that of the Cuban delegate to the Second Committee, who stated that 'his delegation ha[d] abstained from the vote because it had not participated in the Stockholm conference; however the draft [resolution] contained elements that it unreservedly approved.' "U.N. Doc. A/C.2/SR.1479, para. 39." Handl, *State Liability For Accidental Transnational Environmental Damage By Private Persons*, 74 AM. J. INT'L L. 525, 528 N. 10 (1980).

in another is generally recognized."[52] Principle 21 declared:

> States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[53]

Furthermore, an extensive examination of water treaties reveals that such treaties often include articles forbidding river usage that injures a riparian.[54] Such treaties are further evidence of the acceptance of the principle that a river use that injures a co-riparian is unlawful.

Unfortunately, the principle that a river use that injures a co-riparian is unlawful is of limited utility. Even if the principle is accepted as international law between riparians, it provides little guidance for resolving river disputes. The principles of neighbourship law, *sic utere* and restricted territorial sovereignty and restricted territorial integrity do not define what constitutes an unlawful injury. The principle *sic utere* has been criticized as mere verbiage.

> It is repeatedly said in nuisance cases that the rule is *sic utere tuo ut alienum non laedas*, but the maxim is unhelpful and misleading. If it means that no man is ever allowed to use his property so as to injure another, it is palpably false. If it means that a man in using his property may injure his neighbor, but not if he does so unlawfully, it is not worth stating, as it leaves unanswered the critical question of when the interference becomes unlawful.[55]

The principle of neighbourship law has received similar criticism.[56] Likewise, the principles of restricted territorial sovereignty and of restricted territorial integrity seem plagued by the same lack of applicable standards as to what is an injury. Moreover, even if riparians are able to agree as to what degree of injury is unlawful, the riparians may not be satisfied with a rule that only allows them to use a river to the extent that no substantial injury is caused.

> [T]he no substantial harm principle works out favorable for the victim State which is, in the case of successive watercourse, usually the downstream State. Its interests are protected as soon as they become substantially affected, even though the water use in the State of origin was a prior existing use, or after weighing all the relevant factors, a more important use compared to that made by the victim State. It is clear that in this form the principle may, under certain circumstances,

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52. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L. J. 423, 492-93 (1973).

53. *Id.* at 485; *reproduced in* 11 I.L.M. 1416, 1420 (1972).

54. *See, e.g.*, S. SALIBA, THE JORDAN RIVER DISPUTE 49 (1968).

55. WINFIELD & JOLOWICZ, WINFIELD AND JOLOWICZ ON TORT 318 (London: Sweet and Maxwell 10th ed. 1975).

56. LAMMERS, *supra* note 7, at 569.

lead to inequitable results.[57]

IV. EQUITABLE UTILIZATION (APPORTIONMENT)

Under the principle of equitable utilization, each riparian is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of a river.[58] An equitable share is determined by weighing factors in favor of one riparian's use of a river against factors in favor of another riparian's use of a river.[59] These factors include, *inter alia*, geographic, hydrologic or climatic conditions, the existing or prior use made of the waters, the feasibility of alternative means - including the availability of other resources - to satisfy those needs and the possibility of compensation to one or more riparian states as a means of adjusting conflicts among uses.[60] A determination in favor of one riparian does not entitle that riparian to exclusive use of the waters in its territory. A riparian is entitled to use a river only to the degree to which equitable factors support its use.

To illustrate, suppose that State A, a lower riparian, has, for many years used a river for irrigation. State B, upstream, now wishes to utilize the river for hydro-electric power production. The uses of the river for hydro-electric power and irrigation purposes are in conflict. If State B is underdeveloped and will be able to industrialize when supplied with electricity and State A, is more developed, but continues to use an inefficient method of irrigation, then the following factors are relevant to a determination of an equitable usage: existing reasonable use; dependence upon the waters; population; geographic, climatic and weather conditions; the existence of alternative sources of food supply; inefficient utilization; and the financial status of the respective co-basin states.

> If State A can continue to achieve the same agricultural productivity by employing efficient irrigation methods, then those methods may be demanded of State A in order to provide State B with its equitable share. Under the principle of equitable utilization State B will likely be required to compensate State A for the cost of changing irrigation methods.[61]

"The principle of equitable utilization, which is prescribed by international law, requires . . . no more no less than delimitation of each riparian State's rights and duties in respect of a natural resource divided between two or more riparian states."[62]

The 1966 Helsinki Rules concerning the utilization of the waters of international drainage basins, although not universally recognized as the

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57. *Id.* at 363-64.
58. *Id.* at 364.
59. *Id.*
60. *Id.*, *See also* Helsinki Rules, *supra* note 33, at 488-91.
61. Helsinki Rules, *supra* note 33 and accompanying text.
62. LAMMERS, *supra* note 7, at 371.

statement of the principle of equitable utilization,[63] provides a specific elaboration of that principle.[64] The Helsinki Rules read in part:

> Art. 4. Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.
>
> Art. 5.(1) What is a reasonable and equitable share within the meaning of Article IV is to be determined in light of all the relevant factors in each particular case.
> (2) Relevant factors which are to be considered include, but are not limited to:
> (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
> (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
> (c) the climate affecting the basin;
> (d) the past utilization of the waters of the basin, including in particular existing utilization;
> (e) the economic and social needs of each basin State;
> (f) the population dependent of the waters of the basin in each basin State;
> (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
> (h) the availability of other resources;
> (i) the avoidance of unnecessary waste in the utilization of waters of the basin;
> (j) the practicality of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and
> (k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State;
> (3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.
>
> Art. 6. A use or category of uses is not entitled to any inherent preference over any other use or category of uses.
>
> Art. 7. A basin State may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters.
>
> Art. 8. 1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.
> 2.(a) A use that is in fact operational is deemed to have been an existing use from the time of the initiation of construction directly re-

63. *Id.* at 368.

64. Bovine, *Pollution of International Rivers and Lakes*, 21 U. TORONTO L. J. 193, 201 (1971); LAMMERS, *supra* note 7, at 364.

> lated to the use or, where such construction is not required, the undertaking of comparable acts of actual implementation.
> (b) Such a use continues to be an existing use until such time as it is discontinued with the intention that it be abandoned.
> 3. A use will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use.[65]

Comment (b) to Art. IV states that a "beneficial" use is one that is economically or socially valuable. However, the comment further states:

> A "beneficial use" need not be the most productive use to which the water may be put, nor need it utilize the most efficient methods known in order to avoid waste and insure maximum utilization. As to the former, to provide otherwise would dislocate numerous productive and, indeed, essential portions of national economies; the latter, while a patently imperfect solution, reflects the financial limitations of many States; in its application, the present rule is not designed to foster waste but to hold States to a duty of efficiency which is commensurate with their financial resources.[66]

The comments to Art. V elaborate on how the factors are to be weighed.

> In short, no factor has a fixed weight nor will all factors be relevant in all cases. Each factor is given such weight as it merits relative to all the other factors. And no factor occupies a position of preeminence *per se* with respect to any other factor. Further, to be relevant, a factor must aid in the determination or satisfaction of the social and economic needs of the co-basin states.[67]

However, the comment seems to place some special weight on existing uses.[68] "An existing reasonable use is entitled to significant weight as a factor and, as indicated in Article V, consideration must be given to protecting it. However, it is but one factor."[69] The comment to Art. VIII explains when a use is an existing use.

> The rule stated in Paragraph 3 of this Article [VIII] precludes the status of existing use to a use which, when it becomes operational, conflicts with another use already in operation. If the use conflicts with the already existing use only in part, it is denied that status only to the extent of the conflict. Thus, a use may be an existing use with respect to a portion of the water which it appropriates but not with respect to the remainder.[70]

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65. Helsinki Rules, *supra* note 33, at 484-494.
66. *Id.* at 487.
67. *Id.* at 489.
68. "Furthermore. . . many of the general statements of the principles strongly favor prior uses and, generally speaking, the advocates of the doctrine of equitable apportionment tend to have the same bias." BOURNE, *supra* note 10, at 490.
69. Helsinki Rules, *supra* note 33, at 490.
70. *Id.* at 494.

The comment to Article VIII also states that a use may still be existing when not currently being used. In order for an existing use to terminate, it must be abandoned. Abandonment results from the discontinuance of the use coupled with intention to relinquish it. The intention may be expressed or it may be implied from conduct.[71]

The 1958 New York Resolution of the International Law Association provides that a co-riparian only has a right "to a reasonable and equitable share in the beneficial uses of waters."[72] Publicists have stated that the principle is indicative of current trends in the development of international river law.[73] International and domestic decisions have relied upon the principle of equitable utilization for resolving international river disputes.[74] The majority of international river treaties are consistent with the principle of equitable utilization[75] The River Platte Basin Treaty calls for "[R]easonable" and "equitable uses,"[76] and the Amazon Cooperation Treaty seeks "equitable and mutually beneficially results."[77] The vast support for the principle of equitable utilization has lead publicists to state that of the principles of international river law, the principle of equitable utilization comes the closest to being a general principle of international law.[78]

The weight of the authorities in support of the principle of equitable utilization is not necessarily diminished by the support for the principle of no substantial harm. As indicated there is much support for the principle of no substantial harm in the international community.[79] "[T]he ex-

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71. Helsinki Rules, *supra* note 33, at 493-94.

72. Resolution on the Uses of the Waters of International Rivers, in *Report of the Forty-Eighth conference of the International Law Association Held at New York, September 1-7, 1958*, Agreed Principles No. 2 and 3 (1959).

73. *See* BERBER, *supra* note 8, at 209; Bourne, *supra* note 10, at 221; Lipper, *supra*, note 1, at 41-62.

74. "This community of interests becomes the basis of a common legal right. . .the perfect equality of all riparian states the user of the whole or the course of the river. . . ." River Oder Case 1929 P.C.I.J. ser. A, No. 23, 27; Zarumilla River Arbitration (Ecuador v. Peru); Report of the Helmand Delta Commission (Afghanistan v. Iran), Feb. 1951, para. 208; *see also* Lake Lanoux Arbitration (France v. Spain) 24 I.L.R. 101 (1957); Nebraska v. Wyoming, 325 U.S. 589 (1945); Wyoming v. Colorado, 259 U.S. 46 (1922); Kansas v. Colorado, 206 U.S. 46 (1907); *see* R. Scott, *Kansas v. Colorado Revisited*, 52 AM. J. INT'L L. 432 (1958).

75. *E.g.*, Treaty between Egypt, Sudan and Great Britain: The Nile, Gr. Brit. T. S. No. 17, p. 33 (1929); Treaty between the Union of Soviet Socialist Republics and Turkey (1927) (cited in Legal Aspects of Hydroelectric Development of Rivers and Lakes of Common Interest, at 138, U.N. Doc. E/ECE/136 (1952)); Treaty of Peace and Friendship and Arbitration between the Dominican Republic and the Republic of Haiti, 105 L.N.T.S. 216 (1930).

76. The Treaty on the River Platte Basin, *signed* April 23, 1969, 8 I.L.M. 905, 906, art. 1(b).

77. Treaty for Amazon Cooperation, [Bolivia-Brazil-Colombia-Equador-Guyana-Peru-Surinam-Venequela], *done at* Brasilia, July 3, 1978, 17 I.L.M. 1045, 1046, art.1.

78. Bovine, *supra* note 64, at 201; SMITH, THE ECONOMICAL USES OF INTERNATIONAL RIVERS 148 (1931); Hirsh, *Utilization of International Rivers in the Middle East*, 50 AM. J. INT'L L. 81 (1956); Lipper, *supra* note 1, at 41-62 (1967).

79. *See supra* notes 42-54 and accompanying text.

tent of harm inflicted to the victim State will always remain a very important *factor* in determining whether a certain use can be regarded as equitable so that in many cases application of the no substantial harm principle may lead to the same result as the principle of equitable utilization."[80]

V. OPTIMAL USE

"The principle of optimal use of the waters of an international watercourse . . . implies that riparian States must together strive at making the *optimal* use which could be made of the waters as if they were not intersected by state frontiers."[81] Optimal use seeks the most economically beneficial use of the river and does not necessarily pursue the most equitable use. To distinguish optimal use from beneficial use, as used in Article IV of the Helsinki Rules, the Commentators characterized an optimal use as "the most productive use to which the water may be put . . . the most efficient methods known in order to avoid waste and insure maximum utilization."[82] Significantly, to qualify as a beneficial use under Article IV, the use does not have to be the optimal use, merely, "it must be economically or socially valuable."[83] While the optimal use of international watercourses may be "a laudable goal for states to pursue, it is not *yet* required by general international law." (Emphasis added.)[84]

Although "highly desirable from an overall hydroeconomic point of view, it cannot be said that general international law has already so far developed that basin states are legally obliged to strive at the optimum rational development of common water resources on a basin-wide scale."[85] The Lake Lanoux Arbitral Tribunal stated that an upstream State "is not obliged to associate the downstream state in the elaboration of its schemes."[86] It has been inferred from the Tribunal's opinion that "there is no duty to attempt to arrive at forms of water utilization which would lead to an *optimal* use of the waters considering *all* the interests involved . . . ."[87]

The current absence of a duty to achieve the optimal use of a watercourse may not be indicative of the development of optimal use. While the Helsinki Rules do not expressly require or impose a duty of optimal use on states,[88] the comment to Article II states that "the drainage basin is an indivisible hydrologic unit which requires comprehensive consideration in order to effect maximum utilization and development of any por-

80. LAMMERS, *supra* note 7, at 368.
81. *Id.* at 371.
82. Helsinki Rules, *supra* note 33, at 487.
83. *Id.*
84. LAMMERS, *supra* note 7, at 371.
85. *Id.* at 560.
86. Lake Lanoux Arbitration (France v. Spain) 24 I.L.R. 101, at 140 (1957).
87. LAMMERS, *supra* note 7, at 517.
88. Helsinki Rules, *supra* note 33, at 487.

tion of its waters."[89] The Helsinki Rule's failure to require the optimal use of a watercourse by co-basin states "is not designed to foster waste but to hold states to a *duty of efficiency* which is commensurate with their financial resources. Of course, the ability of a state to obtain international financing will be considered in this context." (Emphasis added).[90] Viewed in this light, it may be said that the Helsinki Rule's do impose a duty of optimal use, limited by the financial resources of the co-basin states involved.

Despite the fact that optimal use is *not* required by international law; "[i]f the rapidly progressing needs of the expanding human race for water are to be met, there is an urgent demand for carefully planned multi-state action."[91] "[I]n recognition of their common interest, increasingly such cc-basin states will voluntarily enter into joint planning and development agreements governing international drainage basins."[92] Olmstead refers to this as a "promising trend."[93]

A good example of such a joint effort is the United States-Canada Treaty relating to the Columbia River Basin.[94] The Treaty" . . . represents an important step in achieving optimum development . . . of the Columbia River Basin as a whole, from which the United States and Canada will each receive benefits materially larger than either could obtain independently.[95]

The Columbia River Basin Treaty allowed the United States to construct a hydroelectric dam in Canadian territory for the purposes of energy production[96] and flood control.[97] The United States agreed to compensate Canada for the use of its territory with both electric power and

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89. *Id.* at 485.

90. *Id.* at 487.

91. C. Olmstead, *Introduction* in *The Law of International Drainage Basins* 7 (Garretson, Hayton, Olmstead eds. 1967).

92. *Id.*

93. *Id.*

94. Treaty between the United States of America and Canada relating to cooperative development of water resources of the Columbia River Basin and annexes, *signed at* Washington, Jan 17, 1961, ST/LEG/SER. B/12 at 206, T.I.A.S. No. 5638 (1964) (hereinafter cited Columbia River Basin Treaty); other treaties seeking the optimal use of a river basin include: Bangladesh-India: Agreement on Sharing the Ganges' Waters, 17 I.L.M. 1045, "BEING desirous . . of making the optimal utilisation of the water resources of their region . . . ."; U.A.R. and Sudan, 453 U.N.T.S. at 64 (1963), seeks "the full utilization of it's [the Nile's] waters."; Syria and Jordon, 184 U.N.T.S. 15, at 36, art. 11, shall undertake "measures to facilitate the maximum use of the capacity of the reservoir"; Argentina-Brazil-Paraguay: Agreement on Parana River Project, *done at* President Stroessner City, Paraguay, Oct, 19, 1979. Diplomatic Note sent by Paraguay's Foreign Minister to the Argentine Foreign Minister on Oct. 19, 1979. Diplomatic Note sent by Paraguay's Foreign Minister to the Argentine Foreign Minister on Oct. 19, 1979, "Italpu may be operated with the flexibility required for it's optimum utilization, up to the maximum of it's potential."

95. Canada and United States: Exchange of Notes on the Columbia River Basin Treaty, 3 I.L.M. 318, 319, *reproduced from* 50 Dep't of State Bull. 200-206 (Feb. 10, 1964).

96. Columbia River Basin Treaty, *supra* note 94, art. 3.

97. *Id.* at art. 4.

dollars.[98] In 1961, when the treaty was signed, Canada was concerned that it would not be able to use all of the power it was entitled to under the treaty, so a provision was added to the effect that the United States would buy Canada's "excess" energy.[99] While Canada, in Article 8 retains a right of refusal with regard to further sales of "excess" energy to the United States, the Treaty has been criticized "on the ground that such a power, usually cheaper in Canada, is required for the development of Canadian industry and that once sold it is very difficult to recapture it because the American users develop a vested need which would be very difficult to later disregard."[100] There was also some debate in Canada as to the legality of exporting power under Canadian law,[101] and "some question as to whether the technical arrangements represent a program for the optimum utilization of the river's power potential."[102] However, it is important to note that Cohen characterized the Columbia River Basin Treaty as an "important and *successful* bi-national approach to the development of a common river basin." (Emphasis added.)[103]

The success of the Columbian River Basin Treaty should not be vitiated because of the good relations between the United States and Canada. This Treaty, significantly and effectively, dealt with the problem of basin development between nations of different technological and financial levels. In the absence of an international duty to achieve the optimal use of a river basin, this Treaty may serve as an example of international cooperation aimed at developing water resources to their fullest.

VI. EQUITABLE UTILIZATION AND OPTIMAL USE: A COMPARATIVE ANALYSIS OF THEIR DEVELOPMENT

The principle of equitable utilization is gaining acceptance as the law of international rivers.[104] The principle of optimal use arguably creates no duties for co-basin states to develop a watercourse to the maximum extent feasible. The doctrine of equitable apportionment (utilization) was applied in the United States as early as 1907 to resolve an interstate river dispute in *Kansas v. Colorado*.[105] While the decisions of domestic courts are not binding upon international tribunals, Article 38(l)(d) of the Statute of the International Court of Justice does allow them to be considered as a "subsidiary means for the determination of the rules of law."[106] The

98. *Id.* at art. 6.

99. *Id.* at art. 8.

100. Cohen, *The Columbia River Treaty - A Comment*, 8 MCGILL L. J. 212, at 214 (1962).

101. *Id.*

102. *Id.* at 213, expressing some disagreement between U.S. and Canadian engineers with regard to the optimum method of development.

103. *Id.* at 215.

104. *See* notes 52-72 and accompanying text.

105. Kansas v. Colorado, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956 (1907).

106. Statute of the International Court of Justice, *done at* San Fransisco, June 26, 1945, *entered into force* for the United States, Oct. 24, 1945, 59 Stat. 1055, T.S. No. 993, 3

United States Supreme Court, in discussing the applicable law stated that ". . . as an international, as well as domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand . . . ."[107] "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.[108]

In *Nebraska v. Wyoming*, the court said that "apportionment calls for the exercise of an informed judgment on consideration of many factors."[109] The Court identified several factors in addition to priority of appropriation (prior appropriation was adhered to by both parties involved) including: physical and climatic conditions, consumption uses, rate of return flows, existing uses, availability of storage water or alternative sources, and the comparative benefits and injuries to the states resulting from the use.[110] "These are all relevant factors."[111] In 1966, the International Law Association identified these factors as they apply to the international community in their Helsinki Rules, at Art. 5.[112] The principle of equitable utilization for rivers among the different states of the United States preceded its general application in the international arena, although the degree of any causal connection may be debated.

Interestingly, the Helsinki Rule's definition of equitable utilization holds "States to a duty of efficiency . . . commensurate with their financial resources."[113] In other words, the optimal use that the states can afford to make of the watercourse. The common theme of the factors in Art. 5 of the Helsinki Rules is the avoidance of waste or undue injury to other basin states.[114] Previously, the United States Supreme Court in *Kansas v. Colorado*,[115] acknowledged that the appropriation by Colorado "has worked some detriment to . . . Kansas,"[116] but compared the proportionately "great benefit"[117] that Colorado had received from the appropriation. The Court determined that to force Colorado to give up their use would work a greater economic hardship than allowing it to continue and would have a subsequent deleterious effect on the economy of the nation as a whole. Moreover, it would be inequitable not to allow Colo-

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Bevans 1153, 1976 Y.B.U.N. 1052, *reproduced in* Basic Documents in International Law and World Order 23, 27 (Weston, Falk and D'Amato ed. 1980).

107. 206 U.S. 46, 48.

108. The Paquete Habana, 175 U.S. 677, at 700 (1899).

109. Nebraska v. Wyoming, 325 U.S. 589, 618, 65 S.Ct. 1332, 1351, 89 L.Ed. 1815 (1945).

110. *Id.* at 618.

111. *Id.*

112. Helsinki Rules, *supra* note 33, at 488.

113. *Id.* at 487.

114. *Id.* at 488.

115. 206 U.S. 46.

116. *Id.* at 113-114.

117. *Id.*

rado's exiting use to continue. In other words, the Court sought the avoidance of waste.

The United States' and international applications of the doctrine of equitable utilization have been done so as to avoid the greatest harm or to obtain the optimal use of a river, in an equitable manner. Reflecting this promising trend Schewbel and Everson, both Special Rapporteurs of the International Law Commission on the Law of the Non-Navigational Uses of International Watercourse, have articulated the principle of *equitable participation*, which is closely related to and stems from the principle of equitable utilization. Schwebel states that: "[i]t may be maintained that there now exists a duty under general international law to participate affirmatively to effect more rational development, use and protection of shared water resources. To the extent that state practice does not establish that duty, it is believed that the progressive development of international law should establish it."[118] Everson is of the opinion that the principle of equitable participation, with its inclusion of a duty to achieve the optimal use of a watercourse is already an established principle of international law.[119]

If the principle of equitable utilization is interpreted and applied to foster the least waste and optimum development, as limited by financial resources, then the principle of equitable participation, with its duty of optimal use, may already be an established principle of international law. "The talents of experts, including water engineers and economists, may be widely utilized . . . as a reservoir of knowledge and know-how which, when applied, would greatly enhance the opportunity of achieving *optimum basin development and equitable utilization for all.*" (Emphasis added.)[120]

VII. CONCLUSION

The principles that appear to be followed by the international community are no substantial harm and equitable utilization, and possibly optimum use.[121] Although the principle of no substantial harm provides a

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118. S.M. Schwebel, Special Rapporteur [ILC] Third Report on the Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN. 4/348, Dec. 11, 1981, at 57. If rational development is considered to be the optimal development, then it is interesting to compare the language of several treaties like the River Platte Basin Treaty which calls for the "best" and "rational utilization" 8 I.L.M. 905; or the Amazon Cooperation Treaty which also calls for the "rational utilization of the natural resources" 17 I.L.M. 1046, art.1; *see also supra* note 85 and accompanying text.

119. J. Evensen, Special Rapporteur [ILC] First Report on the Law of Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN. 4/367, Apr. 19, 1983, at 33-34.

120. Lipper, *supra* note 1, at 60.

121. While it cannot be said that optimal use is required by international law, State practice may be indicative of customary international law, despite the fact that many treaties do not claim to be establishing precedent in this area. *See generally supra* notes 80-101 and accompanying text; M.E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4-5 (1985); OPPENHEIM, *supra* note 4, at 25-27; VON GLAHN, LAW AMONG NATIONS: AN INTRODUC-

definition of what is a legal river use, the principle does not provide standards for judging the legality of a river use or for reaching an equitable resolution of a river dispute.

The principle of equitable utilization, on the other hand, does provide usable standards for resolving a river dispute. This is not to say the principle of no substantial harm is of no significance. The principle of equitable utilization embodies the no substantial harm principle along with many other factors.[122] In some cases the harm caused to a riparian by the river use of another riparian may be so great that under either the principle of equitable utilization or the principle of no substantial harm the use may be prohibited.[123] However, it is when the degree of harm is not so severe that the principle of equitable utilization is clearly more useful to resolving disputes. This is because the principle of equitable utilization, unlike the principle of no substantial harm, provides equitable standards by which all river disputes may be resolved.

The principle of equitable utilization has been applied in many river disputes, however, its acceptance is not universal.[124] The reason why the international community has been cautious to accept the principle of equitable utilization or any other principle for that matter, is explained by Olmstead:

> This reservation probably stems in part from traditional notions of national sovereignty as embracing every aspect of a nation's physical territory, and in part from a reluctance of states to submit competing claims to such an important resource as water to state negotiation much less to determination by an international tribunal applying international law. The comparatively recent and rapidly accelerating use of water resources for consumption, as distinguished from navigation, a factor which greatly increases the value of control over water flowing through the state, has intensified this reluctance.[125]

Nevertheless, the trend of international river law as manifested by state conduct appears to be in a direction of raising the principle of equitable utilization to the status of an accepted principle of international law.[126] This is probably because the principle of equatable utilization allows the States involved to consider the factors that are important to their own, individual drainage basin, emphasizing the factors that are important to the people of that particular drainage basin. "One cannot but

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TION TO PUBLIC INTERNATIONAL LAW 14-15 (3d ed. 1976).

122. *See supra* note 65 and accompanying text.

123. *Id.* There is no doubt that in determining an equitable apportionment of benefits, a minor injury will be ignored whereas a serious one will probably be considered as a weighty factor.

124. *See* C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION, 528 (1964); F. BERBER, *supra* note 8, at 40-42; Utton, *Sporhase, El Paso, and the Unilateral Allocation of Water Resources; Some Reflections on International and Interstate Groundwater Law*, 57 U. COLO. L. REV. 551 (1986).

125. OLMSTEAD, *supra* note 91, at 3.

126. LIPPER, *supra* note 1, at 66.

conclude that the principle of equitable apportionment remains a principle with an extremely flexible content."[127] In the words of Trelease:

> A good water law should be based on a proper value system; it should have an underlying bias that elicits general support . . . Law is man's creation; law should serve man, not things or governments. If the law is to be comprehensive it must, of course, protect the resource and promote the public good, but it is *people* who want to preserve the natural features of lakes and streams; it is *people* whose farms and factories contribute not only profit to them but prosperity to the State, and it is *people* who make up the population of cities.[128]

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Erickson Shirley

127. LAMMERS, *supra* note 7, at 420.

128. Trelease, *A Water Management Law for Arkansas*, 6 U. ARK. LITTLE ROCK L. J. 369, 371-72 (1983).

STUDENT COMMENT

INS v. Cardoza-Fonseca: Inching Toward a Determinable Standard of Proof in Political Asylum Cases

I. INTRODUCTION

The United States Supreme Court, in *INS v. Cardoza-Fonseca*, 480 US____,107 S.Ct 1207 (1987), recently decided that the standard of "clear probability" from section 243(h) of the Immigration and Nationality Act does not apply to section 208(a) asylum claims.

This article discusses both the holding and the scope of the *Cardoza-Fonseca* decision and identifies the issues left open for further resolution. This analysis reveals pertinent prior lower and Supreme Court cases as well as applicable legislative history from the U.S. Congress and the United Nations. Finally, the article discusses the need for a alternative standard in asylum determination and the implications of the *Cardoza-Fonseca* case in providing such a standard.

II. FACTS OF *INS v. CARDOZA-FONSECA*

On June 25, 1979 the Respondent, Luz Marina Cardoza-Fonseca, illegally entered the United States as a non-immigrant visitor. After exceeding the permitted stay, the Immigration and Naturalization Service (INS) commenced deportation procedures against her. Respondent requested withholding of deportation pursuant to section 243(h)[1] and asylum as a refugee pursuant to section 208(a).[2] The Board On Immigration Appeals (BIA) denied her claim for withholding of deportation under section 243(h) and political asylum under section 208(a).[3] The Respondent ap-

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1. The Immigration & Nationality Act sec.243(h), 8 U.S.C. § 1253(h) (1982) provides withholding of deportation if an alien can show that "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned.

2. The Immigration & Nationality Act sec.208(a), 8 U.S.C. § 1158(a) (1982) permits a discretionary grant of asylum by the Attorney General to an alien who has demonstrated persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," § 101(a)(42), 8 U.S.C. § 1101(a)(4).

3. *In re* Cardoza-Fonseca, File No. A24 420 980 San Francisco at 3 (BIA Sept. 1983). The BIA converged the standards for withholding of deportation and political asylum by maintaining the immigration judge's holding that the Respondent had not established a

pealed the BIA decision to the United States Court of Appeals for the Ninth Circuit, which reversed and remanded for reconsideration.[4] The case was appealed to the U.S. Supreme Court and decided on March 9, 1987. The U.S. Supreme Court affirmed the Ninth Circuit's decision.[5]

III. STATUTORY HISTORY AND BACKGROUND

Contemporary asylum law can find its roots within U.S. assention to the 1967 United Nations Protocol Relating to the Status of Refugees[6] ("1967 Refugee Protocol" or "Protocol") Prior to this Protocol, relief was available to any alien who was within the United States if the deportable alien was subject to persecution upon deportation and could demonstrate a "clear probability of persecution" or a "likelihood of persecution."[7]

Relief was generally unavailable at U.S. borders to aliens seeking refuge due to persecution. Conditional entry was established in 1965 to address the admission of refugees outside U.S. boundaries.[8] Additionally, the Attorney General was authorized to "parole aliens temporarily into the country" for "emergency reasons" or for "reasons deemed strictly in the public interest."[9]

Conditional entry was restricted by a numerical ceiling placed on admission and, as with the parole power, it was severely limited by the ideology and geographic location of the applicant.[10] It was the 1967 United

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"clear probability of persecution." This was based on finding no difference between the clear probability and withholding of deportation standards.

4. The court in Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985), found that the Immigration Judge and the BIA erred in applying the clear probability standard of proof of § 243(h) to her § 208(a) asylum claim. Additionally, the court agreed with the Respondent's assertion that the well-founded fear standard of 208(a) is more generous than the clear probability standard of 243(h). The case was appealed to the U.S. Supreme Court and decided March 9, 1987.

5. For a more comprehensive examination of the facts, *see* INS v. Cardoza-Fonseca, 480 U.S. ____, 107 S. Ct. 1207 (1987).

6. The United Nations Protocol relating to the Status of Refugees was opened for signature on January 31, 1967. 19 U.S.T. 6233, T.I.A.S. No. 6577, 606 U.N.T.S. 267. It was ratified by the United States on October 4, 1968. 114 CONG. REC. 29,607 (1968). The Protocol incorporated the pertinent aspects of the "refugee" definition in article 1 and articles 2-34 of the 1951 Convention relating to the Status of Refugees, 19 U.S.T. 6260, T.I.A.S. No. 6577 (hereinafter cited as the 1967 Protocol).

7. The Attorney General was authorized to withhold deportation of a deportable alien under § 243(h) of the Immigration & Nationality Act of 1952, 8 U.S.C. § 1253(h) (1964 ed.) e.g. Lena v. INS, 379 F.2d 536, 538 (CA 7 1967); *In re* Janus and Janek, 12 I. & N. Dec. 866, 873 (BIA 1968); *In re* Kojoory, 12 I. & N. Dec. 215, 220 (BIA 1967).

8. Pub. L. No. 89-236 § 3, 79 Stat. at 913, repealed by 94 Stat. 107.

9. 1952 Act, § 212(d)(5), 66 Stat. at 188 (current version at 8 U.S.C. § 1182(d)(5) (1976)).

10. Both remedies for overseas refugees had gross favoritism to those fleeing communist countries. See World Refugee Crisis: The International Community's Response, Report to the Committee on the Judiciary, 96th Cong., lst Sess. 213 (1979). This report shows a pre-1968 use of parole power favoring total authorized Communist refugees, at 232, 711 to the non-communist refugees at 925.

Nations Protocol Relating to the Status of Refugees,[11] that set the stage for contemporary asylum law. Assention to the Protocol bound each party to the adopted provisions of the Protocol, including the definition of "refugee" as a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion."[12]

The sponsors of the Protocol, as well as the Senate and the President, were certain that assention to the Protocol would not interfere with existing immigration law.[13] Ratification of the Protocol brought a recognition by Congress that INS lacked conformity to the standards set out in the Protocol. It became increasingly apparent to Congress that the INS was not properly implementing practices and procedures of the Protocol, but was using practices and procedures which were frustrating the implementation of the Protocol. Despite considerable flexibility permitted under the withholding of deportation provision, the BIA retained the clear probability standard.[14] Additionally, the courts lacked conformity in a refugee eligibility standard. As Justice Stevens noted in *INS v. Stevic*,[15] the courts that reviewed withholding of deportation determinations after the U.S. became a party to the Protocol differed in their application of an appropriate refugee eligibility standard. Some courts used the well-founded fear standard.[16] Other courts used the clear probability standard,[17] while other formulations were conceived by other courts.[18] The need for legislation to conform INS standards and practices to those of the 1967 Protocol was not met until the passage of the 1980 Refugee Act ("Refugee Act" or "Act").[19]

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11. *See supra* note 6.

12. 1967 Refugee Protocol, *supra* note 6, art. 1(2) (directly incorporating the definition of "refugee" contained in the 1951 Refugee Convention, *supra* note 6, art. 1(A)(2)).

13. The Senate Foreign Relations Committee report shows experts and Protocol sponsors were unequivocal in their assurances that ratification of the document "would not impinge adversely upon the federal and state laws of this country." S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 2 (1968).

14. *In re* Joseph, 13 I. & N. Dec. at 72.

15. INS v. Stevic, 467 U.S. 407 (1984).

16. Pereira-Diaz v. INS, 551 F.2d 1149, 1154 (9th Cir. 1977); Zamora v. INS, 534 F.2d 1055, 1058 (2d Cir. 1976); Paul v. INS, 521 F.2d 194, 200 (5th Cir. 1975).

17. Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977); *Pierre* v. United States, 547 F.2d 1281, 1289 (5th Cir. 1977), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir.), *cert denied*, 429 U.S. 853 (1976); Rosa v. INS, 440 F.2d 100, 102 (lst Cir. 1971).

18. Khalil v. District Director, 457 F.2d 1276, 1277 n.3 (9th Cir. 1972) ("would be persecuted"); Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977) ("probable persecution"); Daniel v. INS, 528 F.2d 1278, 1279 (5th Cir. 1976); Shkukani v. INS, 435 F.2d 1378, 1380 (8th Cir.), *cert. denied*, 402 U.S. 920 (1971); Gena v. INS, 424 F.2d 227, 232 (5th Cir. 1970) ("likely" persecution); *Kovac* v. INS, 407 F.2d 102, 105 (9th Cir. 1969) ("probability of persecution").

19. Prior to the passage of the 1980 Refugee Act, bills were considered by the House of Representatives to contain the "wellfounded fear" language. *See* Western Hemisphere Immigration Hearings on H.R. 367, H.R. 981, and H.R. 10323, before the House Subcomm. on Immigration, Citizenship and International Law of the Comm. on the Judiciary, 94 Cong.,

A. *The 1980 Refugee Act*

The Refugee Act was designed to bring the United States into conformity with the Protocol. This created significant changes in existing immigration law. First, the Act established a new standard of uniform and non-ideological refugee eligibility. This was accomplished by incorporating the Protocol's definition of "refugee" into U.S. immigration law[20] and adding the asylum provision of section 208(a) to the INA.[21] Additionally, the Act amended section 243(h),[22] eliminating the discretionary power of the Attorney General by requiring that all aliens who meet the standard for eligibility be granted withholding of deportation.[23] The requirement that an alien be subjected to persecution was substituted for the require-

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lst & 2nd Sess. (1976).

20. Compare the definition included in the Refugee Act of 1980 which reads: The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

8 U.S.C. § 1101(a)(42) (1982), with the definition embodied in the 1951 Refugee Convention and the 1967 Refugee Protocol:

[T]he term "refugee" shall apply to any person who. . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

The United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter referred to as the 1951 Convention], art. l(A), as amended by 1967 Refugee Protocol, *supra* note 6 at art. 1(2).

The joint explanatory statement of the Conference Committee on the bill which became the Refugee Act observed that both the House and Senate versions of the bill incorporated the Protocol's definition of refugee. H.R. conf. Rep. No. 781, 96th Cong., 2d Sess. 1, (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 160. The conference report adopted the House provision which "incorporated the U.N. definition, as well as Presidentially-specified persons within their own country who are being persecuted or who fear persecution" and excluded "persons who themselves have engaged in persecution." *Id.*

21. H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 19(1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 160. The asylum provision provides as follows:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Immigration and Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1982).

22. 8 U.S.C.§ 1253(h) (1982).

23. 8 U.S.C. § 1253(h)(1) (1982). Prior to 1980, section 243(h) provided that: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which, in his opinion, the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems necessary for such reason." Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1976) (amended 1980).

ment that an alien just show that his life or freedom is threatened.[24] Unfortunately, Congress failed to establish a definite standard for section 243(h) claims and this omission of an applicable standard has created numerous disputes over the degree of proof an alien needs to present for withholding of deportation.[25]

Given the multifarious results of the Refugee Act in approaching a refugee standard,[26] it was only a matter of time before the Supreme Court would hear a case on the withholding of deportation standard.

B. INS v. Stevic

The issue before the U.S. Supreme Court in *INS v. Stevic*[27] was whether Congress had intended to liberalize the standard of proof required to obtain withholding of deportation under section 243(h) of the Refugee Act. The case was brought up from the Second Circuit, which ruled that the Refugee Act had adopted a more liberal "well-founded fear of persecution" test in section 243(h) cases consistent with the international standards in the 1967 Protocol.[28]

In a unanimous decision, the Court held that an alien must establish a "clear probability of persecution" to avoid deportation under section

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24. *Id.* As amended by the Refugee Act, section 243(h)(l) of the INA provides that: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(l) (1982).

25. For a discussion on the different interpretations over whether the statutory revisions of the Refugee Act had changed the degree of proof an alien needs for § 243(h) claims, *see* Helton, *Political Asylum under the 1980 Refugee Act, An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243, 252-53 (1984).

26. The well-founded fear standard as set forth in § 101(a); definition of refugee contributed to the inter-circuit dissension over the standard of proof applicable to § 243(h), withholding claims, and § 208(a), asylum claims.

The Second and Sixth Circuits took the position that the well-founded fear standard was more lenient than the clear probability standard. These courts applied the well-founded fear standard to both withholding of deportation and asylum claims. *See, e.g.*, Stevic v. Sava, 678 F.2d 401, 409 (2d Cir. 1982) ("asylum may be granted, and under Section 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that an individual will be singled out for persecution"), *rev'd sub nom.* INS v. Stevic, 467 U.S. 407 (1984); Reyes v. INS, 693 F.2d 597, 599 (6th Cir. 1982) (following Stevic v. Sava), *vacated*, 747 F.2d 1045 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2173 (1985). In contrast, the Third Circuit found no difference between the two standards and applied clear probability to both withholding and asylum claims. *See, e.g.*, Rejaie v. INS, 691 F.2d 139, 146 (3d Cir. 1982) ("We read 'well-founded fear' within the circumstances of its use and hold that it equates with 'clear probability.' "). The Board of Immigration Appeals also equated the well-founded fear standard with the clear probability standard following passage of the 1980 Refugee Act. *See, In Re* Lam, 18 I. & N. Dec. 15, 17-18 (BIA 1981); *In re* Salim, 18 I. & N. Dec. 311, 314 (BIA 1982). This view was rejected by the Supreme Court in INS v. Stevic, 467 U.S. 407, 425 (1984). *See infra* notes 48-49 and accompanying text.

27. INS v. Stevic, 467 U.S. 407 (1984).

28. Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982).

243(h)[29] thus maintaining the BIA practice of construing the clear probability standard to mean that it was "more likely than not that the alien would be persecuted in the country to which he was being deported."[30] In *Stevic*, equal deference should be given to what the Court did not hold. It did not hold that the clear probability and well-founded fear standards are synonymous.[31] It did not define the meaning of the phrase "well-founded fear" of persecution. However, it did say that the "well-founded fear standard is more generous than the clear probability of persecution standard. . . ."[32]

Failing to define the well-founded fear standard in asylum cases perpetuated the incongruity between the circuit courts on the issue of whether there is any difference between the clear probability standard for withholding of deportation, and the well-founded fear standard for asylum eligibility.[33]

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29. *Id.* at 430.

30. *Id.* at 429.

31. *Id.* at 430.

32. *Id.* at 425. The court in *Stevic* seemed to lace this opinion with language of compromise in a very controversial case. The New York Times, in its analysis of the court's may shed some light into the court decision when it surmised:

> The Court's failure to reach the asylum issue may indicate that the case was more difficult than it appeared to be from the unanimous opinion. The narrow treatment may have been the result of a behind-the-scenes compromise designed to break a six-month deadlock. The case, *I.N.S. v. Stevic* [sic], No. 82-973, was argued Dec. 6, making it one of the oldest cases on the Court's docket. The Court does not ordinarily take that long on a case it decides unanimously. New York Times, June 6, 1984.

33. The Third Circuit singularly contended that there is no difference between the well-founded fear and clear probability standards. *See* Sotto v. INS, 748 F.2d 832 (3d Cir. 1984). The court was reaffirming its position in Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982). The Sixth Circuit noted that the well-founded fear standard required a lesser showing than the clear probability standard. *See* Youkhanna v. INS, 749 F.2d 360 (6th Cir. 1984). The court in *Youkhanna* found that neither standard had been satisfied in that case. In contrast to the Sixth Circuit's silence on the issue, the Seventh Circuit addressed the difference in the evidence required for asylum and withholding of deportation. The court in Caravajal-Munoz v. INS, 743 F.2d 561 (7th Cir. 1985) indicated that the "clear probability" standard requires objective evidence to corroborate the applicant's testimony, while "sometimes" the applicant's testimony alone will be sufficient to meet the well-founded fear standard. *See* Carava-jal-Munoz, 743 F.2d at 562.

The United States Court of Appeals for the Ninth Circuit decided that the well-founded fear standard for asylum adjudication was easier to fulfill than the clear probability standard for withholding of deportation. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282-83 (9th Cir. 1985). In *Bolanos-Hernandez* the court held that there was a clear probability that the petitioner would be subject to political persecution if he returned to El Salvador. *Id.* at 1287-88. Specific threats against Bolanos-Hernandez were sufficient to establish a threat of persecution, even though they were representative of the general level of violence in El Salvador. *Id.* at 1284-85. Bolanos-Hernandez's neutrality constituted a political opinion. *Id.* at 1286-87. The court held that he had met the clear probability standard for withholding of deportation and reversed the denial of his section 243(h) claim. *Id.* at 1287-88. Holding that "an alien who has met the clear probability standard has, *a fortiori*, demonstrated a well-founded fear of persecution," the court reversed and remanded the denial of Bolanos-Hernandez's section 208(a) claim. *Id.* at 1288.

Additionally, *Stevic*'s failure to instruct on the differences between the "clear probability" standard for withholding of deportation and the "well-founded fear" standard for asylum eligibility, preserved the BIA's interpretation that the two standards converge.[34]

C. *In Matter of Acosta*

After years of inconsistency on the part of the BIA in interpreting the standards of proof for section 208 and section 243,[35] the Board *In Matter of Acosta*[36] attempted to clarify its understanding of the well-founded fear standard. In *Acosta*, the Board maintained its practice of converging section 208 asylum claims and section 243 withholding of deportation standard when it concluded that in practical applications the standards "converge."[37] The BIA based its determination of "well-founded fear of persecution" on its understanding of congressional intent when passing the Refugee Act.[38] The BIA also methodically selected favorable language from the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status[39] ("UNHCR Handbook" or "Handbook").

Acosta provided the BIA with a comprehensible opinion to base its understanding and application of well-founded fear by merging the standard with the clear probability standard and requiring refugees to satisfy the clear probability standard for their asylum claims. This burden of proof was placed on Cardoza-Fonseca by the BIA in her claim for asylum.[40] The BIA, after ignoring Cardoza-Fonseca's argument that the clear

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34. The BIA first converged the well-founded fear and clear probability standards of § 208 and § 243, respectively, in *In re* Dunar, 14 I. & N. Dec. 310 (BIA 1973) when the Board announced that it believed that the clear probability of persecution standard was not different from the well-founded fear of persecution standard found in the 1967 Protocol Relating to the Status of Refugees.

35. The Board's interpretation of section 208(a) regarding the standard of well-founded fear has been far from consistent. *Compare* Matter of McMullen, 17 I. & N. Dec. 542, *rev'd on other grounds*, McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981) (requiring proof of actual persecution), with Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982) (requiring "objective evidence that [the applicant] has a well-founded fear that he is likely to be singled out for persecution. . ."), and Matter of Sibrun, 18 I. & N. Dec. 354, 358 (BIA 1983) (requiring that the alien ". . . demonstrate a likelihood that he individually will be singled out and subjected to persecution.")

36. Matter of Acosta, Interim Dec. No. 2986 (Mar. 1, 1985).

37. *Id.* at 25.

38. *Id.*

39. *Id.* at 24. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1979) [hereinafter UNHCR HANDBOOK]. To the extent that the Handbook does not require an asylum seeker to show that he is more likely than not to be persecuted, the Board rejects the Handbook as inconsistent "with Congress' intention and with the meaning of the Protocol." *In re* Acosta, Interim Dec. No. 2986, at 19, 25 (BIA Mar. 1, 1985).

40. *See generally* Cardoza-Fonseca v. INS, File No. A24 420 980, San Francisco at 3 (BIA Sept. 1983).

probability standard was the wrong standard to apply to the asylum request,[41] ruled that its conclusion would be the same whether it applied "a standard of clear probability," "good reason," or "realistic likelihood" of persecution."[42]

D. *The Ninth Circuit In Cardoza-Fonseca v. INS*

In reversing the BIA decision,[43] the Ninth Circuit, in *Cardoza-Fonseca*, embraced a well-founded fear standard that was contrasted with the clear probability standard by drawing a distinction between "probability" and "possibility" of persecution.[44] The court endorsed a formulation derived from *Bolanos-Hernandez v. INS*, an earlier Ninth Circuit case.[45]

The *Bolanos* court noted that an evaluation of "well founded fear" includes an inquiry into the subjective element of the applicant's state of mind, as well as objective elements like the conditions, the law and experiences of others in the country of origin.[46]The court's determination that "well-founded fear"[47] must be supported by objective evidence[48] must not be coalesced with the BIA construction of "well-founded fear." The BIA required that an individual's fear of persecution have a basis in objective facts that shows a "realistic likelihood" of persecution.[49] The applicable difference between the BIA and the Ninth Circuit's "well-founded fear" language is the BIA's interpretation of "realistic likelihood" to mean a clear probability of persecution,[50] whereas the Ninth Circuit interpreted "realistic likelihood" to mean a reasonable existence of persecution.[51]

IV. *INS v. CARDOZA-FONSECA* OPINION

In *Cardoza-Fonseca*,[52] the U.S. Supreme Court held that the "clear probability" standard of proof for section 243(h), "withholding of deportation," does not govern asylum applications under section 208(a).[53] Jus-

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41. *Id.* at 11.

42. *Id.* at 13.

43. *See generally* Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985).

44. *Id.* at 1450.

45. Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985).

46. *Id.* at 1282. The *Bolanos* court went on to say that one who has qualified for asylum as opposed to withholding of deportation, may have established only the existence of a valid reason to fear. *Id.* at 1285.

47. The court in *Cardoza-Fonseca* notes that the well-founded fear standard requires that "the alien have a subjective fear." Cardoza-Fonseca v. INS, 767 F.2d at 1452.

48. The court requires that objective facts "support an inference of past or risk of future persecution. That the objective facts are established through the credible and persuasive testimony of the applicant does not make those facts less objective." *Id.* at 1452-53.

49. *In re* Acosta, Interim Dec. No. 2986 at 21 (BIA Mar. 1, 1985).

50. *See id.* at 25. *See also* Rozell Asylum Eligibility. The Proper Standard For Asylum Eligibility Is A Well-Founded Fear Of Persecution, 26 VA. INT'L L.J. 1039, note 68 and accompanying text.

51. *Cardoza-Fonseca*, 767 F.2d at 1452.

52. *See generally*, INS v. Cardoza-Fonseca, 480 U.S. ____, 107 S. Ct. 1207 (1987).

53. *Id.* at 1212-1215.

tice Stevens, in a 6 - 3 majority, delivered the opinion of the court. After an exhaustive examination of the legislative history surrounding the standards under sections 208(a) and 243(h), the majority concluded that the statutory language of the 1980 Refugee Act indicates a congressional intent that the two standards should differ.[54] The court based this conclusion on the statutory language of sections 208(a) and 243(h). In section 243(h) the court notes that the "would be threatened" language "has no subjective component." However, it requires that the alien "establish by objective evidence that it is more likely than not that he. . .will be subject to persecution."[55] The court contrasted the section 208 standard by concluding that the relevance to "fear" in the standard requires a subjective mental state in the alien and this is the foundation for eligibility.[56]

Congressional intent to have separate standards for section 208 and section 243, the court noted, was evident in the simultaneous drafting of the section 208 standard while leaving the standard of section 243(h) intact.[57]

The court, in its examination of the Refugee Act and its language, found it necessary to look at legislative history for support, despite its conclusions that the plain language of the Act appeared to settle the question before them.[58] It found influential precedent which was coactive with the Refugee Act in a historical interpretation in various bodies of law.

A. Section 203(a)(7)

The first was the link between pre-1980 section 203(a) (7)[59], and section 207 standards[60] of admission. The court found that Congress was satisfied with the procedural methods by which they dealt with refugees outside the United States[61] and they adopted the "well-founded" lan-

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1213-1214. The court explained its examination of the legislative history with, "In this case, far from causing us to question the conclusion that flows from the statutory language, the legislative history adds compelling support to our holding that Congress never intended to restrict eligibility for asylum to aliens who can satisfy § 243(h)'s strict, objective standard." *Id.* at 1213-1214. *See* note 12 and accompanying text.

59. 8 U.S.C. § 1151. This statute authorized "conditional entry" to a regulated arrival of refugees fleeing from communistdominated areas of the Middle East based on "persecution or fear of persecution on account of race, religion, or political opinion."

60. The Immigration and Nationality Act, § 207 - 8 U.S.C. § 1157, regulates the admission of refugees who seek admission from foreign countries. Compare section 207 with section 208, which applies to refugees currently in the U.S. *See supra* note 2. Both look to section 101(a)(42) for the statutory definition of "refugee." *See also supra* note 20.

61. The procedure was considered acceptable under the U.N. Protocol. However, the court found that the geographical and political distinctions were unacceptable under the Protocol. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1215.

guage to be in conformance with the 1967 U.N. Protocol.[62] The court concluded that the requirements of clear probability of persecution "to show a well-founded fear" would be an abrogation of congressional intent, and that the standard for admission under section 207 is the same as the one previously applied under section 203(a)(7).

The U.N. Protocol[63] was, as the court concluded, the primary purpose for the 1980 Refugee Act.[64] The court traced back the Protocol's definition of "refugees" and found that it was incorporated into the 1951 U.N. Convention Relative to the Status of Refugees,[65] and eventually incorporated into the 1967 Protocol.

The court concluded that the standard of "well-founded fear" has been consistently understood as not requiring an alien "to show that it is more likely than not that he will be persecuted in order to be classified as a refugee."[66]

B. The UNHCR Handbook And U.N. Protocol

The court found additional assistance in separating the two sections, 208 and 243 respectively, in the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status.[67] It concluded that the Handbook is consistent with the court's examination of the standard to be considered for "well-founded fear." The court noted that the applicant's fear is well-founded when it is proven that staying in the country of origin has become intolerable for reasons stated in the definition, or that it would be intolerable if he/she returned, for the same reasons, and if this can be established by a reasonable degree.[68]

The Handbook provides guidance in construing the Protocol and has been widely used for establishing the obligations of the Protocol, the court noted.[69] However, it was not suggested by the court that the Handbook binds the BIA to its reference with section 208.[70]

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62. *Id.* at 1216-1217.

63. 1967 Protocol, *supra* note 6.

64. *Cardoza-Fonseca*, 480 U.S. ___, 107 S. Ct. at 1216.

65. The court found that the definition of "refugee" is found in the 1946 Constitution of the International Refugee Organization (IRO) which defined a "refugee" as a person who had a valid objection to returning to his country of nationality, and specified that "fear, based on reasonable grounds of persecution because of race, religion, nationality, or political opinions. . ." constituted a valid objection. See IRO Constitution 1 § C annex 1 art. 1(a)(i), as cited in *Cardoza-Fonseca*, at 1216.

189 U.N.T.S. 150 (July 28, 1951). The court noted that the Committee that drafted the provision explained that "[t]he expression 'well-founded fear of being the victim of persecution . . .' means that a person has either been actually a victim of persecution or can show good reason why he fears persecution." U.N. Rep. 39 as cited in *Cardoza-Fonseca* at 1216. *See also supra* note 20.

66. *Cardoza-Fonseca*, 480 U.S. ___, 107 S. Ct. at 1215.

67. UNHCR HANDBOOK, *supra* note 39.

68. *Cardoza-Fonseca*, 480 U.S. ___, 107 S. Ct. at 1217-1218.

69. *Id.* at 1217, and *supra* note 22.

70. *Id.* at 1217, and *supra* note 22. The suggestion of using the Handbook as guidance

The court analogized the 1951 United Nations Convention Relating to the Status of Refugees,[71] articles 33.1 and 34, with sections 208 and 243, respectively, and concluded that section 243's and section 208's discretionary mechanism is "precatory" and, like article 33, does not require the implementing authority actually to grant asylum to all those who are eligible.[72] The court concluded that the Protocol's article 33.1 requests a discretionary benefit for those aliens who qualify as refugees, while article 34 is an entitlement for the subcategory of those who "would be threatened." This distinction between the broad class of refugees and the subcategory entitled to section 243(h) relief is plainly revealed in the 1980 Act.[73]

C. *Rejection Of The Senate Bill*

The court's exhaustive examination of pertinent legislative history ended with a conclusion that congressional rejection of the Senate Bill[74] under consideration preceding the passage of the 1980 Act in favor of the House Bill;[75] "demonstrates that Congress eventually refused to restrict eligibility," for asylum only to aliens meeting the stricter standard.[76]

D. *Government's Arguments Rejected*

The government asserted two primary arguments for converging the section 208 and section 243 standards; both arguments were rejected by the Court.[77] The court found that the government's contention, that it is anomalous for section 208 to have a less stringent standard than section 243, when section 208 provides greater benefits than section 243, is nonsensical. The Court firmly rejected this argument when it said:

> We do not consider it at all anomalous that out of the entire class of

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for construing a "well founded fear" standard may have considerable consequences for future interpretation and application of "well-founded fear." This is discussed in text and accompanying notes 88-100.

71. 1961 Convention, *supra* at note 6. The court found that section 243(h) corresponds with article 33.1 in that section 243(h)'s imposition of a "would be threatened if deported" stems from article 33.1. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1218-1219, is comparable to article 33.1's requiring an applicant to satisfy the burden of proving that he/she has a well-founded fear of persecution, i.e. he/she is a refugee and that the refugee can show that his/her life or freedom would be threatened. *See id.* at 1218.

72. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1218.

73. *Id.* at 1218.

74. Senate Bill, S.643, 96th Cong. lst Sess. (1979).

75. House Bill, H.R. 2816, 96th Cong. lst Sess. (1979).

76. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1218-1219.

The Senate Bill contained a provision which included the additional burden on a refugee that he could not obtain asylum unless "his deportation or return would be prohibited under section 243(h)" S.Rep. 26. Thus, the court reasoned that the Senate's inclusion of this additional requirement for section 208 relief indicates that the Senate recognized a difference between the "well-founded fear" standard of section 208 and the "clear probability" standard of section 243. *Id.* at 1218.

77. *Id.* at 1219-1222.

> 'refugees,' those who can show a clear probability of persecution are entitled to mandatory suspension of deportation and are eligible for discretionary asylum, while those who can show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum.[78]

The court also rejected the government's second argument, that substantial deference should be accorded the BIA's position of converging the "clear probability standard" and "well-founded fear" standard. The court reasoned that the issue of congressional intent to draft the standards as identical is subject to statutory construction.[79] This is not a question of case-by-case interpretation left to administrative agencies, but an issue of statutory construction of which the courts are the final authority.[80]

E. The Dissenting Opinion

Justice Powell, in writing the dissenting opinion,[81] found the BIA interpretation of sections 208 and 243, respectively, "reasonable."[82]

The dissenting opinion was drafted around three objections to the *Cardoza-Fonseca* decision. The first was the view that legislative history seems to indicate that congressional intent authorized the Attorney General to apply their interpretation of the "well-founded fear" standard prior to 1980, and that this standard should carry over in adjudicating asylum applications.[83]

The dissent, in its second objection, found the majority's reliance on the materials interpreting the U.N. Protocol, "marginally relevant."[84] Concluding that the materials encouraged a mathematical approach to the likelihood of persecution, the dissent asserted that the BIA's rejection of such an approach is consistent with the drafters of the Protocol.[85]

Finally, the dissent objected to the majority's reliance on the Conference Committee's rejection of the Senate bill in favor of the House bill.[86] The difference between the two bills is insignificant, thus the Conference Committee's choice of the language of the House bill is equally insignificant, the dissent concluded.

V. CONCURRING OPINIONS

A. Justice Scalia's Concurring Opinion

Justice Scalia, in his concurring opinion, provided an interesting

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78. *Id.* at 1219.
79. *Id.* at 1220-1221.
80. *Id.*
81. Justice Powell was joined by the Chief Justice and Justice White. *Id.* at 1225.
82. *Id.* at 1228-1229.
83. *Id.* at 1229.
84. *Id.* at 1229-1230.
85. *Id.* at 1230.
86. *See supra* note 76 and accompanying text.

summation of the majority's downfalls in reaching a judgment, of which the Justice concurs; but he objected to methods of reaching this conclusion: "Since the Court quite rightly concludes that the INS's interpretation [of "well-founded fear"] is clearly inconsistent with the plain meaning of that phrase and the structure of the Act, . . . there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference."[87]

Justice Scalia further noted that the majority's excessively gratuitous examination of legislative history raises the potential for misuse in the principles of administrative law as well as the betrayal of the majority's assurance that they were not setting forth a detailed standard for "well-founded fear."[88]

One can only hope that Justice Scalia's conjecture becomes operational, thus providing the court with a detailed interpretation of the well-founded fear standard, based on the UNHCR Handbook. The Handbook has been widely circulated and approved by governments.[89] Additionally, the Handbook has been used in many judicial decisions in the interpretation of the 1967 Protocol,[90] and since the 1980 Refugee Act was designed to bring the U.S. into conformity with the 1967 Protocol, the use of the Handbook for interpretation of "well-founded fear" is a consistent choice.

The need for the Handbook's guidance after the *Cardoza- Fonseca* opinion is certain. Even though the majority clearly endorsed the Handbook as a legitimate interpretation of the "well-founded fear" standard, the court fell short in breathing substantive life into the standard, "but instead left the task to the INS in a process of case-by-case adjudication."[91]

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87. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1224. Justice Scalia is concerned about what he views as an "unjustifiable" use of the majority's "superfluous discussion to express controversial, and I believe erroneous, views." *Id.* at 1222 on refashioning important principles of administrative law in cases in which such "questions are completely unnecessary to the decision." *Id.* at 1225.

88. *See supra* note 71 and *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1224, note 31. Justice Scalia referred to the majority's endorsement of the UNHCR Handbook, which explains "well-founded fear" as:

> In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reason be intolerable if he returned there.

UNHCR HANDBOOK, *supra* note 39 at Ch. II B(2)(a) § 42. *See also Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1216.

89. Report of the 30th Session, U.N. Doc A/AC.96/572 (1979) at paras. 68, 72 (l)(h); Report of the 31st Session U.N. Doc. A/AC. 96/5878 (1980).

90. McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984); Ananoh-Firempory v. INS, 766 F.2d 621 (lst Cir. 1985). Matter of Rodriguez-Palma, 17 I. & N. Dec. 965 (BIA 1980); *In re* Frentescu, 18 I. & N. Dec. 244 (BIA 1982).

91. *Cardoza-Fonseca*, 480 U.S. ____, 107 S. Ct. at 1221.

B. Justice Blackmun's Concurring Opinion

Justice Blackmun, in his concurring opinion, noted this eschewal of a substantive attachment to the well-founded fear standard by the court, and noted that he understood "the court has directed the INS to the appropriate sources from which the agency should derive the meaning of the well-founded fear standard.[92] The need for a well-founded fear analysis that examines the "subjective feelings of an applicant coupled with an inquiry into the objective nature of the articulated reasons for the fear,"[93] was noted by Justice Blackmun. He found the necessity of such formula based on INS' previous interpretation of the well-founded fear standard, which was strikingly contrary to the plain language of the Refugee Act and legislative history.

Justice Blackmun concluded that "while the INS need not ignore other sources of guidance," the integration of the previously mentioned well-founded fear formula "should be significant in the agency's formulation. . ."[94]

VI. CONCLUSION

The Handbook's interpretation of "well-founded fear" provides satisfactory guidance for such a formula. Expanding on the previously mentioned explanation of "well-founded fear" as construed by the UNHCR Handbook, the definition of "well-founded fear" has been explicated in the Handbook as follows:

> Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment of the situation prevailing in his country of origin.[95]

The Handbook recognizes that this element of fear is the added qualification of "well-founded." It is a state of mind that encompasses not only the frame of mind of the person in question that determines refugee status, "but this frame of mind must be supported by an objective situation."[96] As mentioned above, the Handbook recognizes the importance of the objective element in evaluating the statement made by the applicant. However, the Handbook emphasizes that the fear of the applicant, and not the hypothetical likelihood of future events, is the central element of the "refugee definition."[97] This evaluation sharply contrasts with conventional forms of evidence which the INS expected to substantiate well-

92. *Id.* at 1223.
93. *Id.*
94. *Id.*
95. UNHCR HANDBOOK, *supra* note 39 at para. 38.
96. *Id.* at para. 40.
97. *Id.* at para. 41.

founded fear claims.[98]

Thus, when INS converged the "well-founded fear" and "clear probability" standards, as in *Cardoza-Fonseca*, its evaluation of the respondent's political asylum claim sharply contrasted with the Handbook's interpretation of "well-founded fear." Clearly, an applicant for asylum might have a "wellfounded fear" of persecution long before "all or virtually all" of the members of his group had actually become victims of persecution.[99]

Unfortunately, the Supreme Court in *Cardoza-Fonseca* fell short of a precise determination of the necessary standard for asylum claims. The effects of the Supreme Court's failure to specify what is a minimum likelihood of persecution necessary to establish a well-founded fear are unclear. However, it is evident by the BIA's action in the *Matter of Sanchez and Escobar*,[100] decided subsequent to the Ninth Circuit's holding in *Cardoza- Fonseca*,[101] that an inequitable denial of asylum can exist under the standards laid out in *Cardoza-Fonseca*, based on a failure to satisfy the objective element in the evaluating statement.[102]

Additionally, the BIA can effectively close the gap between the two standards by requiring evidence of selective persecution, i.e. that an individual must show that he or she has been selected for persecution based on specific facts,[103] in order to satisfy the well-founded fear standard.

This BIA requirement of objective evidence falls short of the necessary evidence to take into account what is "well-founded fear." The court should not only take into account the general history of persecution in the home country and the applicant's personal experience and that of his or her family, (i.e. persecution based on race, religion, nationality, etc.) but also the intensity of fear, the nature of the projected harm (i.e.death,

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98. *Id.* at para 42. *See also supra* notes 47-50 and accompanying text.

99. The use of "clear probability" or a comparable standard for determining refugee status would require almost certainty of persecution. As noted by the petitioner in *Stevic*, 467 U.S. at note 26 and accompanying text, evidence to substantiate the "clear probability" of persecution is "evidence of persecution of all or virtually all members of a group or class to which the alien belonged. . ." Petitioner's Brief in INS v. Stevic at 9, 23 and notes 25 and 32.

100. *Sanchez and Escobar*, Interim Dec. No. 2996 at 5. (BIA Oct. 1985).

101. *See generally* Cardoza-Fonseca v. INS, 767 F.2d I448 (9th Cir. 1985).

102. The BIA found that the standard delineated by the court did not change the outcome in the *Sanchez and Escobar* Interim Dec. No. 2996 at 5 (BIA Oct. 1985). The BIA denied Sanchez and Escobar's claim because they failed to establish "a clear probability of persecution under section 243(h) or a well-founded fear of persecution under section 208(a) of the Act, as that standard is described in *Cardoza-Fonseca v. INS*." *Id.* at 14.

The BIA's denial of asylum and withholding was based on the objective limitations of the applicant's fear of persecution. They failed to establish that their persecution was based on or on account of race, religion, nationality, membership in a particular social group, or political opinion as required by the Act. *See Sanchez and Escobar*, Interim Dec. at 12.

103. As noted above, the BIA requires that specific facts that show a selective persecution based on, or on account of, race, religion, nationality, membership in a particular social group, or political opinion. *See Sanchez and Escobar*, Interim Dec. at 5.

imprisonment, torture, detention, serious discrimination, etc.) and all other surrounding circumstances.[104] One can only hope, with the Supreme Court's reliance on and endorsement of the UNHCR Handbook coupled with the Supreme Court's conclusion that "well-founded fear" focuses on the reasonableness of fear and not on the likelihood of events, that future courts will apply the appropriate standard.

The need for a humanitarian standard is unequivocal. The harm done by an erroneous decision, excluding a refugee from asylum status, is often worse than that caused by a wrongful conviction.[105] The likelihood of an erroneous decision transpiring is increased by an unrealistic standard of proof.[106]

An approach to an asylum determination which recognizes the gravity of harm subsequent to an erroneous decision, and the special situation of the applicant, would place the U.S. in accordance with its long history of rhetoric[107] in welcoming the "huddled masses yearning to breathe free."[108]

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104. Bolanos-Hernandez v. INS, 767 F.2d at note 45. This approach is illustrated by a recent decision of the Higher Administrative Court, Hamburg, decision of April 11, 1983 - OVG Bf. V 30182, *InfAuslR* 1983, p. 137, *also published in* Marx, 1 *Asylrecht* (1984) at 237-8: "In case of serious sanctions such as death penalty or long-term imprisonment or severe torture, it can be sufficient that the possibility of these sanctions being applied is *not remote*." (Translation by UNHCR) (emphasis supplied). *See also* Benipal v. Ministers of Foreign Affairs and Immigration, Action No. 878/83, 1016/83 (High Court of New Zealand, Nov. 29, 1985):

> Clearly there are subjective and objective considerations in the application of the definition to the facts. While as a matter of convenience it is useful to distinguish between the two ingredients, it can lead to error to regard them as separate and independent elements which can be considered in isolation. If fear exists, the issue whether that fear is well-founded cannot be divorced from the fear itself: it is *in relation to the fear* that the issue of 'well-founded' must be decided, not in relation to anything else. . . . (at 228)

105. *See supra* notes 89, 95 and accompanying text.

106. *Cf.* Bayles, *Principles for Legal Procedure*, 5 LAW AND PHILOSOPHY 30 (1986) at 33-57.

107. The history of refugees and U.S. governmental rhetoric have their origins at the foundation of the republic up to the present time. In 1783, George Washington proclaimed America a land whose "bosom is open to receive the persecuted and oppressed of all nations." George Washington's "Address to the Members of the Volunteer Association and Other Inhabitants of the Kingdom of Ireland Who Lately Arrived in the City of New York," Dec.7, 1973, in The Writings of George Washington, XXCII (GPA, Washington, D.C., 1983), P. 244. More recently, President Ronald Reagan, in his acceptance speech for the Republican nomination for President, said: "Can we doubt that only a Divine Providence placed this land , this island of freedom here as a refuge for all those people who yearn to breathe free? Jews and Christians enduring persecution behind the iron curtain; the boat people of southeast Asia,Cuba, and of Haiti; the victims of drought and famine in Africa; the freedom fighters in Afghanistan." Ronald W. Reagan, "acceptance Speech, " Detroit, Michigan, July 17, 1980, p.8. Unfortunately, President Reagan's speech was nothing more than rhetoric as displayed by his Executive Order directing the U.S. Coast Guard to intercept boats laden with Haitians sailing in the direction of the U.S. and tow them back to Port-au-Prince. *See* President Ronald W. Reagan, "High Seas Interdiction of Illegal Aliens,"Exec. Order No. 12324, 46 Fed. Reg. 48109 (1981).

108. E. LAZARUS, "THE NEW COLOSSUS," POEMS OF EMMA LAZARUS, 202 (The Riverside Press, Cambridge, Mass. 1982).

DEVELOPMENT

Soviet Human Rights Under Gorbachev: Old Wine in a New Bottle?

> In times of crisis, nearly everything may depend on the regard and confidence placed in some man who possesses the experience and qualities of a leader.[1]
>
> Plutarch

I. INTRODUCTION

The Soviet government has through its seventy year history frequently been criticized by Western governments for its unfavorable record on human rights. Following the Bolshevik revolution in 1917 and Lenin's short rule, the Soviet people endured twenty-four years of hegemony under Joseph Stalin. As a result of Stalin's intentions to create an industrial and military power, numerous hard-line policies were formed, some of which still remain today.

Gorbachev's ascent to power has brought the area of human rights into an evolving and dynamic period. He has introduced "*glasnost*," a policy where through the devices of criticism and monitoring by the masses, the Soviets can be assured of a more healthy and prosperous society. In order to achieve this there has been a relaxation in government policy towards censorship, demonstrations, and prisoners. Most academicians have found it premature to voice a decisive opinion on whether human rights have in fact improved, mainly because the Gorbachev administration is so new at coping with these issues.

The strained issue of human rights, which has been a major obstacle in East-West relations has been somewhat diminished. Developments witnessed in freedom of expression and movement might not completely satisfy Western demands, however the steps which have been taken by the Soviets do not appear to be mere token gestures. This article will begin with a historical background of human rights in the Soviet Union tracing the developments from Stalin to Krushchev to Gorbachev.[2] The central part of this article will discuss recent developments in five primary areas of Soviet human rights: political prisoners; minority and religious prison-

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1. PLUTARCH, MORALIA, COLLECTED WORKS OF PLUTARCH 340 (3d ed. 1951).

2. For studies on Gorbachev, *see* CONG. RESEARCH SERVICE, Rep. No. 85-858F; and Simis, *The Gorbachev Generation*, 59 FOREIGN POL'Y 3 (1985).

ers; demonstrations; censorship; and emigration. Finally, this article will inspect the effectiveness of glasnost and whether Gorbachev's policies will persevere.

II. BACKGROUND

Upon reading the Constitution of the Soviet Socialist Republics, one is struck by the remarkable likeness of its articles regarding individual rights and liberties to the United States' Bill of Rights. The most significant article in this respect is Article 50, which states: "In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations."[3] Despite the similarity in language, the judicial interpretation by Soviet courts has clearly not been as generous as their U.S. counterparts. Since 1918, the value of Art. 50 has been comparable to a lead statue leafed in gold. It gives a striking and majestic first impression, however, merely scraping the exterior reveals its true worth. It is also astonishing that individual liberties were stressed by the most ruthless of all Soviet leaders, Joseph Stalin, who once wrote:

> Real liberty can be had only where exploitation is destroyed, where there is no oppression of one people by another, where there is no unemployment, and pauperism, where a person does not shiver in fear of losing tomorrow his job, home, or bread. Only in such a society is it possible to have real, and not paper, liberty, personal and otherwise.[4]

Despite this hypocritical statement by Stalin, many rights formally affirmed by the Supreme Law of the Soviet remained "dead letters" for over two decades after 1936. Freedom of speech, press, assembly and association, and inviolability of persons' homes and correspondence were more often breached than obeyed; something which was acknowledged at the XXth Party Congress and by succeeding Soviet leaders.[5]

After the death of Stalin in March 1953, significant progress was made in the area of personal and social rights. However, the Soviet state has still remained a totalitarian one party oligarchy in which political activity opposing the government on basically any issue is barred, and freedom of expression will be permitted only within the limits of the existent "party-line."[6]

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3. KONST. SSSR, art. 50 (revised and adopted 1977). In comparison, Amendment I of the Bill of Rights states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or for the right of people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

4. Izvestia, Dec. 8, 1936, at 1 (article by Stalin).

5. F. SCHUMAN, RUSSIA SINCE 1917, at 231-236 (2d ed. 1979).

6. D. BRAHAM, SOVIET POLITICS AND GOVERNMENT 392 (2d ed. 1975). *See also* J. HAZARD, MANAGING CHANGE IN THE USSR (1983).

It is justifiable to state that the Communist human rights movement was initiated by Nikita Krushchev. As a counter-reaction to the harsher policies of Stalin, Krushchev liberated millions of people from prisons.[7] Krushchev's motives were not based on benevolence or deep-felt sympathy, instead, he had three broad motives for liberalizing human rights in the Soviet Union. First, he sought to set in motion the extensive human resources of the Soviet Union after a prolonged period of stagnation. Second, he wanted to satisfy the West's desire for concessions on human rights issues. And third, he wished to improve the general atmosphere of East-West relations in order to facilitate increased trade and arms control. Gorbachev is motivated by very similar goals. Like Krushchev, Gorbachev has concluded that in order to restore health to the economy,[8] and to narrow the technological deficiency towards the West, it is essential to mobilize the so-called "creative intelligentsia" on his side. This is a strong and radical prescription to cure the illness which is plaguing the Soviet system.[9]

Human rights issues in the Soviet Union have been influenced by the United Nations Covenant on Human Rights of 1973, which was ratified by the Soviet Union.[10] In addition, the Soviets signed the final act of the "Conference on Security and Co-operation in Europe of 1975," better known as the "Helsinki Accord."[11] Though the Accord is not a treaty, and is therefore not legally binding, it has been treated almost as a legal commitment by the signatory states. It seems quite probable that both of these agreements have influenced the current Soviet leadership in its position on human rights. For example, the Soviet Union has begun to real-

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7. V. CHALIDZE, PRAVA CHELOVEKA I SOVETSKI SOIUZ (1974). English: TO DEFEND THESE RIGHTS 51 (1974). *See also* R. MEDVEDEV, KNIGA O SOTSIALISTISHESKOI DEMOKRATII (1972). English: ON SOCIALIST DEMOCRACY (1975). Both of these experts believe that the Soviet system would be acceptable to the rest of the world community if the Soviets would adhere to their own constitutional rights guarantees.

8. It is important to note the economic developments in the USSR; examples being in annual rates of growth: Total GNP: [1961-65] 5.0% p.a., [1984] 2.5% p.a.; Consumption: [1961-65] 3.7% p.a., [1984] 3.0% p.a.; Investment: [1961-65] 7.5% p.a., [1984] 1.7% p.a. Further statistics can be found in CIA Handbook of Economic Statistics, C.P.A.S. 85-10001 (1985), at 64-65.

9. *See* CONG. RESEARCH SERVICE, REP. No. 86-87 F [hereinafter CRS 86]. This is an excellent report from the XXVIIth Soviet Communist Party Congress.

10. Ved. Verkh. Sov. SSSR No. 40 item 4564 (1973); *ratification on* Sept. 18, 1973.

11. Text of the Final Act can be found in 73 Dep't State Bull. 323 (1975), or in 14 I.L.M. 1292 (1975). Pertinent sections concerning human rights are Principle VII and Basket III. Principle VII deals with respect for human rights and fundamental freedoms. The most significant section states that: "The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion." Under the section for cooperation in humanitarian and other fields, Basket III covered cooperation regarding family unification, travel, sports, activities, and freer and wider dissemination of information. *See generally* APPRAISAL OF ITS RAMIFICATIONS: HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD (T. Buergenthal ed. 1977); Coughlin, *Monitoring of the Helsinki Accords: Belgrade 1977*, 10 CASE W. RES. J. INT'L. L. 511 (1977).

ize that a nation state's method of treating its population is not solely a domestic concern.[12]

Socio-economic conditions have reached such a low ebb in the USSR that outsiders do not hesitate to speak of a crisis in the country's internal metabolism. This crisis began with Leonid Brezhnev, and accentuated in the last ten years of that regimes existence, the crisis lingered on into the paralyzing interregnum of the early 1980's. To the Soviets, this lethargy would imply a threat to the viability of their political system, together with prediction of imminent discontinuities. In short, there is a crisis of effectiveness.

Gorbachev's liberalization of the system has been cloaked in the term "*glasnost*," which can be interpreted as greater openness in public life, candor, and self-criticism. Interestingly enough, this term was also used by Lenin.[13] Possibly the best interpretation of *glasnost* is democratization of the system. *Glasnost* may be the boldest act by a Soviet leader since 1917. How exactly does *glasnost* fit into the Gorbachev administration's overall strategy? The name of the strategy is *perestroika*, or economic restructuring. Gorbachev calls *perestroika* "a revolution,"[14] one which most likely will take years to achieve. He reinforces this contention by stating that: "we need glasnost as we need the air."[15] Without it, the Soviet Union will most likely stagnate, will fail to compete in the world, and will be vulnerable to outside pressures. *Glasnost* came first, creating the freer atmosphere in which the drive for democratization has been launched in earnest. *Glasnost* and *perestroika* now mean two things in the human rights sector: 1) they are weapons Gorbachev has handed to the Russian intellectuals meant to destroy inefficiency in the bureaucracy; and, 2) they are an entrance back into the "normal" life for individuals who had been wrongly imprisoned.[16]

In his concluding speech to the Central Committee on January 28, 1987, Gorbachev spoke about *glasnost*: "The Communist Party firmly holds that the people should know everything. *Glasnost*, criticism, and self-criticism, monitoring by the masses - these are the guarantees of the healthy development of Soviet society. The people must know everything and consciously make judgments about everything."[17] While the *glasnost* policies of the Gorbachev leadership are essentially identical to the ones of the Krushchev leadership, they have manifested as more systematic

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12. *See* Henkin, *The U.N. and Human Rights*, 19 INT'L ORG. 504 (1965), and, CONG. RESEARCH SERVICE, Rep. No. IB83066, at 15. Previously, whenever a country or organization criticized the human rights situation in the Soviet Union, the Soviet government would always counter with the argument that human rights were domestic and not international issues. *Glasnost* appears to be causing greater deference to human rights agreements, which in turn changes the Soviet stance on issues of international domestic concern.

13. Wash. Post, March 22, 1987, sec. C, at 7, col. c.

14. M. GORBACHEV, PERESTROIKA 49 (1987).

15. *Id.* at 78.

16. *See* N.Y. Times, Jan. 4, 1987, sec. 4, at 2, col. 1.

17. Pravda, Jan. 29, 1987, at 1.

and calculated, and have surpassed Krushchev's in scope and radicality.

To carry out his strategy, Gorbachev believes that the vast "untapped resources of socialism" must be mobilized. Central planning and the latest technology are crucial, but the least used resource is the human factor. The Party must arouse the Soviet people from their apathy and convince them that they all have a stake in the success of *perestroika*. According to Gorbachev, this requires "the serious, deep democratization of Soviet society . . . which will enable us to involve in reconstruction its decisive strength - the people . . . . We need democracy like air. If we don't understand this . . . our policies will founder and reconstruction will collapse, comrades."[18] In another speech, Gorbachev states that "we need such powerful forms of democracy as *glasnost*, criticism and self-criticism, to change radically every area of social life." Concluding, he professed that "the more democracy we have, the faster we shall advance along the road of reconstruction and social renewal, and the more order and discipline we shall have in our socialist house. So is it either democracy or social inertia and conservatism. There is no third way, comrades."[19] It has been noted that this democratization process must be somewhat tempered; a high-ranking editor states that "for Gorbachev to be too far ahead of the people is not good."[20]

Despite these extremely positive remarks by the Soviet leader, the Westerner must be cautious not to overreact. Regardless of these intentions of democratization, the USSR will continue with its socialist ideology.[21] *Glasnost's* basic function is not to stimulate democracy, but instead to encourage efficiency and industrial development. As Gorbachev himself states in his book Perestroika: "those in the west who expect to give up socialism will be disappointed."[22] In a July 1987 speech he stressed exactly this point: "We intend to make socialism stronger, not replace it with another system."[23]

The issue thus becomes: can Gorbachev hope to succeed where Krushchev failed? Is there evidence yet of a real shift in the Soviet handling of human rights, or is this another Potemkin's village, what the

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18. Pravda, Jan. 30, 1987, at 1. (Gorbachev's concluding speech at the Plenum of the Central Committee).

19. Pravda, Feb. 26, 1987, at 1.

20. N.Y. Times, Nov. 3, 1987, sec. 1, at 4, col. 1.

21. *Id.*, sec. 1, at 7, col. 2. (text from Gorbachev's speech on the 70th anniversary of the Russian revolution), which states: ". . . people must be taught in practice to live in the conditions of deepening democracy, to extend and consolidate human rights, to nurture a contemporary political culture of the masses; in other words, to teach and to learn democracy . . . perestroika will not succeed without a drastic invigoration of the activities of all party organizations . . . and so we must have a more businesslike and a more democratic attitude, we must improve organization and tighten discipline . . . then we will be able to put perestroika into high gear and impart a new impetus to socialism in its development."

22. M. GORBACHEV *supra* note 14, at 37.

23. Time, July 27, 1987, at 31. *See also* Wash. Post, July 15, 1987, sec. A, at 16, col. a.

Russians call *pokazuka*, or "just for show"?[24] To put flesh on the bones of this skeletal conundrum, one must consider the five primary groups of human rights issues in the Soviet Union: political prisoners; minority and religious prisoners; demonstrations; censorship and emigration.

III. HUMAN RIGHTS ISSUES

A. *Political Prisoners*

Gorbachev understands that economic reforms cannot be truly effective without social reforms. For this reason, professional people in the Soviet Union can expect better relations with the ruling authorities. In addition, if concessions were made to dissidents, the reform coalition of *glasnost* would most likely be strengthened. Other sections of the intelligentsia are being satisfied with relaxed cultural controls, and increased *glasnost* in scholarship, literature, and the arts. Most important is the recent release from imprisonment of people who have close connections to the intelligentsia. This should be considered an extremely strong political gesture by the Kremlin. The United States State Department has announced that there are approximately 700 prisoners convicted for subversive activities in Soviet prisons and camps.[25] In February 1987, 140 prisoners who had been serving time for conducting "anti-Soviet agitation and propaganda" were pardoned by a decree from the government.[26] Included in those released were Anatoly Koryagin, Aleksandr Ogorodnikov, and Iosef Begun.[27]

In the short term, the release of political prisoners has yielded substantial gains beyond merely gratifying the liberal intelligentsia. Though the releases were clearly convincing developments, the unfortunate deaths in prison of several human rights advocates emphasized the dangerous position of thousands of Soviet dissidents.[28] After his release from exile in Gorky,[29] Andrei Sakharov has been openly spreading favorable publicity, without compromising his integrity, calling for support of Gorbachev's general line.[30] Many feel that with each step Gorbachev takes in this enterprise, he is coinstantaneously increasing 1) his own open-mindedness, 2) the esteem of a substantial part of the population, and 3) the support to battle the opponents of *glasnost*.[31]

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24. *See* Wash. Post, Jan. 28, 1987, sec. A, at 18, col. e.

25. N.Y. Times, Feb. 11, 1987, sec. 1, at 1, col. 6.

26. *Id.*; *see also* N.Y. Times, Feb. 8, 1987, sec. 1, at 1, col. 2.

27. CONG. RESEARCH SERVICE, Rep. No. 87-551 F, at 12; N.Y. Times, Feb. 18, 1987, sec. 1, at 1, col. 1. According to an estimate by Amnesty International, the group freed represented ca. one-third of the so-called "prisoners of conscience."

28. *See* N.Y. Times, *supra* note 25.

29. CONG. RESEARCH SERVICE, Rep. No. 87-551 F, at 10 [hereinafter CRS 87].

30. N.Y. Times, Feb. 9, 1987, sec. 1, at 1, col. 2; *see also*, N.Y. Times, Feb. 7, 1987, sec. 1, at 4, col. 5.

31. *Id.*

Another significant development in the area of political prisoners concerns the laws commonly used to place dissenters in labor camps; the statutes governing "anti-Soviet propaganda" and "slandering the Soviet State." These laws still remain on the books, however, there is high level speculation that they will be tempered or repealed.[32] If this change becomes a reality, it would be significant evidence of the Soviet's desire for change. According to Gennadi Gerasimov, spokesman for the Soviet foreign ministry, many of the pardons granted political prisoners were part of a review of the Criminal Code "so that we have fewer people behind bars and behind barbed wire."[33] Other Soviet officials stated that pardons and related measures reflect a genuine determination by Gorbachev to expand the limits of acceptable dissent.[34] Most recently, Gerasimov stated that a general amnesty would be declared, one which would allegedly release hundreds of prisoners. This would be the first amnesty in the history of the Soviet Union relating only to individuals sentenced for political crimes.[35]

B. Minority and Religious Prisoners

Since the early 1930's, minorities and strongly religious individuals have been persecuted and harassed.[36] Today, it appears that the government is taking a obdurate position regarding the treatment of national minorities (such as Volga Germans, Armenians, and Ukrainians) and religious dissidents (primarily Jews, Baptists and Pentecostals). According to a recent report, there has been a small number of national minority prisoners released, but no religious prisoners.[37] It is important to emphasize that only a minuscule portion of the several thousands of religious prisoners have so far been released, and some freed prisoners have been threatened with arrests if they do not maintain silence. Also of impor-

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32. The criminal law provisions which have been most frequently employed are: 1) Law on Crimes Against the State Art. 7, and Art. 70 of the UK RSFSR Criminal Code, which prohibits anti-Soviet agitation and propaganda; Art. 190-1 of the RSFSR Criminal Code, which makes it a crime to circulate statements known to be false which are defamatory to the Soviet system; Art. 64 of the UK RSFSR Criminal Code, which provides for the death penalty or lengthy prison sentences for treason; Art. 209-1 of the UK RSFSR Criminal Code, which prohibits "malicious evasion of performance of decision concerning arrangement of work and discontinuance of parasitic existence;" and, Art. 206 of the UK RSFSR Criminal Code, which prohibits "malicious hooliganism," which is defined as any intentional act violating public order and expressing "clear disrespect for society" which is committed with "exceptional cynicism or special impudence." For an interesting view of why the dissenters should be punished, *see* article in Pravda, Feb. 12, 1977, at 4, which expressed the previous Soviet leadership's views.

33. N.Y. Times, Feb. 12, 1987, sec 1, at 1, col. 1.

34. *Id.*

35. *See* CRS 87, *supra* note 29, at 14.

36. R. MEDVEDEV ON SOCIALIST DEMOCRACY 166 (1975); and A. MARCHENKO, MY TESTIMONY 71 (1969).

37. Report from the Kennan Institute for Advanced Russian Studies, June 1987, at 1 [hereinafter Kennan].

tance is the fact that some of the religious prisoners have come from the ranks of the Russian Orthodox Church. An interesting, though possibly insignificant, development occurred during this last summer, when Rev. Gleb Yakunin was freed from imprisonment, and thereafter reinstated by the Russian Orthodox Church.[38]

C. Demonstrations

During the past year a few demonstrations have occurred in Moscow, the city which is considered the showcase of liberalism. However, even in Moscow, some demonstrations are still being dispersed by strong-armed methods. An example would be the open demonstration by Jews protesting the imprisonment of Jewish dissident Iosif Begun. This demonstration was promptly quashed by the authorities, who through plain-clothes policemen pushed and hit demonstrators.[39] In addition, undesirable demonstrations have been preempted by systematic house arrests.[40] An opposite reaction by the authorities occurred at a demonstration by 300 Taters at the Kremlin gate. The demonstration concerned the Taters desire to return to the Crimea, from where they had been deported in 1944. The police did nothing to stop the noisy demonstration, merely observing it from a distance.[41] In addition, the Kremlin permitted a meeting between President Andrei Gromyko and the Taters. However, Gromyko warned the Taters that to continue to pressure the government would not be in furtherance of their interests.[42] Other demonstrations not disturbed by the authorities involved Soviet Hare Krishnas, who demonstrated in public, asking permission to practice their faith more freely,[43] and a group of 400 Russian nationalists from the *Pamyat* organization, who called for a return to orthodox Leninism.[44] The latter group was permitted to meet with the head of the Moscow Communist Party, Boris Yeltsin. Though the authorities have seemed more inclined to tolerate small, unofficial demonstrations and dissident news conferences, various Soviet spokesmen have alluded that the regime will not tolerate very much in the way of free-spoken dissent.[45]

D. Censorship

Gorbachev has commented that "the press must become even more effective."[46] In addition, he "wishes to emphasize that the press should unite and mobilize people rather than disuniting them and generating of-

38. N.Y. Times, June 8, 1987, sec. 1, at 4, col. 3.
39. N.Y. Times, Feb. 13, 1987, sec 1, at 1, col. 2.
40. *See* Kennan, *supra* note 37.
41. N.Y. Times, July 26, 1987, sec. 1, at 3, col. 4.
42. N.Y. Times, July 28, 1987, sec. 1, at 3, col. 2.
43. Wash. Post, May 2, 1987, sec. A, at 17, col. a.
44. *See* CRS 87, *supra* note 29, at 14.
45. *See* N.Y. Times, April 19, 1987, sec. 1, at 14, col. 1.
46. U.S. News and World Report, Nov. 9, 1987, at 74.

fense and a lack of confidence. Criticism can be an effective instrument of *perestroika* only if it is based on absolute truth and scrupulous concern for justice."[47] The most dramatic developments in this area have been reports in the press discussing economic problems, corruption, and subjects such as suicide, drug use, and rising criminal rates, though these have been controlled by the leadership.[48] The media has also found itself engaged in setting forth viewpoints on moral and cultural values.

An additional development is the increased frankness by the media concerning accidents and natural disasters. Even though *glasnost* clearly failed the test in the immediate aftermath of the Chernobyl disaster, due to the unfortunate failure of swiftly reporting it before Swedish authorities did, it was that failure which seems to have hastened the quick improvements that have occurred since the accident. Proof can be found in the accident between a passenger liner and a cargo vessel, in which 398 people were killed. The reports from the Soviets were not sketchy or delayed, but were instead quite candid.[49]

Regardless of Gorbachev's policy of *glasnost*, there are limits to the extent in which censorship can be lifted. Gorbachev conveyed his approach to such matters at the January plenum, by stating:

> If someone tries to use our extensive glasnost and the democratic process for his own selfish and anti-social purposes, for the purpose of blackening everything, will we really - with such a powerful Party, with such a patriotic people devoted to the ideas of socialism and to its Motherland - not be able to cope with the situation.[50]

Here, Gorbachev appears to be stressing that *glasnost* is not a broadsword which the individual may swing as he pleases against the curtain of freedom. It will be the Soviet society as a whole who shall decide exactly how far that curtain shall be opened. Individualism is therefore limited. Furthermore, it seems clear that the press must be subservient to fulfill the Party's plan.

In discussions of foreign policy matters, *glasnost* has had less success. Real Soviet motivations and negotiating positions are still too secret to be debated by the Soviet public. Nevertheless, western officials, such as Edward Kennedy, Margaret Thatcher, and George Schultz have been permitted to voice harsh views on Soviet television.[51] Most recently, the state publishing company has voiced its desire to publish the autobiography of super-capitalist Lee Iacocca.[52] Hints of an apparent desire by some elements in the leadership, possibly Gorbachev, to withdraw from Afghani-

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47. *Id.*; *see also* Wash. Post, July 1, 1987, sec. A, at 1, col. b. (report on the Soviet legislature's approval of some of Gorbachev's reforms, including freer speech).

48. *See* Kennan, *supra* note 37.

49. *See* CRS 87, *supra* note 29, at 8.

50. N.Y. Times, Jan. 28, 1987, sec. 1, at 8, col. 1.

51. *See* CRS 87, *supra* note 29, at 5. *See also* Wash. Post, Feb. 4, 1987, sec. D, at 1, col. c. This article noted that Pravda began publishing commentary from Western press.

52. Newsweek, Sept. 7, 1987, at 5.

stan were made when a letter by a prominent emigre was permitted to be published in a Moscow newspaper. The letter challenged Gorbachev to withdraw the Soviet troops from Afghanistan. As a counter-reaction, Pravda criticized the letter,[53] but the mere fact that a letter of this type was published is truly revolutionary.

The increased cultural freedom has led to decisions to publish long-suppressed works by writers such as Boris Pasternak, author of Doctor Zhivago.[54] Another book which would never have been published two years ago is Anatoly Rybakov's novel chronicling the terror under Stalin.[55] The Soviet cinema is also changing. "Commissar," which is a twenty year old film on anti-semitism, was shown at the recent Moscow Film Festival.[56]

The fierce ongoing struggle in the Kremlin between the liberal Gorbachev trend and the conservatives is reflected in the equally ferocious conflicts of cultural life. The Kremlin's second in command, Yegor Ligachev, lashed out on the developments by criticizing that enough focus is not being directed towards the classics.[57] Among the literary-political publications, those controlled by conservatives (e.g. Zvezda and Literaturnaya Rossiya) continue jousting with those edited by the liberals (e.g. Ogonyok and Novyi Mir).

Numerous new journals have sprouted out of these developments. One of these journals is named *Glasnost*, and is written by a group of dissidents and freed political prisoners.[58] Another journal, edited by the known dissident Sergei Grigoryants, apparently contained articles of a sort not seen in the Soviet Union since the 1920's.[59] Due to the recent uncharacteristic use of truth in the press, the population has reacted by purchasing more magazines and newspapers.[60]

For the present, *glasnost's* prospects in this field seem quite good. Most of the influential positions are now in the hands of people who favor it, such as the head of state publishing, Nenasev; the Minister of Culture, Zakharov; and the editor of the Moscow News, Yakovlev. This group is clearly empowered to influence the arts by thrusting back the boundaries of censorship.

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53. N.Y. Times, Mar. 26, 1987, sec. 1, at 10, col. 3.

54. *See* CRS 87, *supra* note 29, at 7 and 12; N.Y. Times, Feb. 13, 1987, sec. 1, at 5, col. 1; Wash. Post, Jan. 8, 1987, sec. A, at 1, col. a; Newsweek, Nov. 9, 1987, at 10. Pasternak was denounced and expelled from the Soviet Writers Union in 1958 for "anti-Soviet" writing.

55. N.Y. Times, March 14, 1987, sec. 1, at 1, col. 2.

56. N.Y. Times, July 18, 1987, sec. 1, at 3, col. 3. Of plays, "The Brest Peace" by Mikhail Shatrov, and "Requiem" by Anna Akhmatova have been permitted to be performed. *See* CRS 87, *supra* note 29, at 14.

57. N.Y. Times, May 28, 1987, sec. 1, at 1, col. 3.

58. N.Y. Times, June 28, 1987, sec. 1, at 12, col. 3.

59. N.Y. Times, July 23, 1987, sec. 1, at 27, col. 3.

60. N.Y. Times, May 12, 1987, sec. 1, at 30, col. 1.

E. Emigration

The past decades have seen drastic reductions and increases in emigration. During Stalin's years there was virtually no emigration. Brezhnev reacted quite to the contrary, by permitting 260,000 Jews to leave in the 1970's. During the interregnum between Brezhnev and Gorbachev, permission to emigrate slowed to a trickle. Since entering office, Gorbachev has hinted that emigration restrictions may be relaxed.[61] In considering this issue, Gorbachev must weigh many factors, including the fact that the Jewish population is the most educated of all the nationalities in the Soviet Union. Permitting emigration on a grandiose scale may not prove itself an asset to the Soviet state. Quite contrary, the Soviet Union would lose not only some of its greatest minds, but also some of its greatest artists. There are Soviet officials who have stated that there is no political dividend to be gained by an open policy of emigration.[62] It should be remembered that emigration has never been considered a right in the Soviet Union,[63] and that the handling of emigration policies has always been an internal affair. It appears that this position is softening, possibly influenced by the Helsinki Accord.[64]

According to some estimates, there are 11,000 refusniks in the Soviet Union who have applied for exit visas,[65] and nearly 400,000 who have shown interest in leaving.[66] Other nationalities which have shown interest in leaving are the Germans and the Armenians. According to official West German reports there are 100,000 Germans who wish to emigrate, while German repatriation organizations believe that there are 300,000. There are reports that possibly 200,000 Armenians would leave if permitted.[67] In 1986, the Soviet government permitted 914 Jews to leave, less than in 1985 when 1140 left the Soviet Union. Currently, emigration of Jews has risen strongly, as 5,398 people have so far been permitted to emigrate. German and Armenian emigration has also increased.[68]

Despite these positive developments, a new emigration law has been introduced, restricting emigration to those who receive invitations from immediate family members. Under this new emigration law, only 30,000 to 40,000 individuals would be eligible to leave.[69] This law, which went into effect in January 1987, is a great deal tougher, not liberal, and may be considered a potential source of foreign and domestic tension. If the

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61. CONG. RESEARCH SERVICE, Rep. No. IB 82080, at 2 [hereinafter CRS IB].
62. N.Y. Times, Jan. 2, 1987, sec. 1, at 5, col. 1.
63. N.Y. Times, Feb. 11, 1987, sec. 1, at 12, col. 2.
64. *See* CRS IB *supra* note 61, at 3.
65. N.Y. Times, May 2, 1987, sec. 1, at 27, col. 2.
66. *See* CRS IB *supra* note 61, at 5.
67. *Id.* at 6-7.
68. *Id.* at 9. German emigration: 1986 - 753, 1987 - 3,550; Armenian emigration: 1986 - 247, 1987 - 1,281. 1987 statistics concerning Jews are through Sept. 30, 1987; concerning Germans, through June 30, 1987; and concerning Armenians, through August 31, 1987.
69. N.Y. Times, Jan. 2, 1987, sec. 1, at 5, col. 1.

Soviets hold to the general intent and letter of the law, emigration will once again decline to a trickle. Only a very small proportion of the more than half million who have indicated their wish to emigrate will qualify to do so because relatively few potential emigrants have relatives outside of the Soviet Union. The current trend appears to be away from the liberal policies of the 1970's, with an effort directed towards encouraging these individuals to stay, but to allow them a greater freedom of travel.[70]

IV. CONCLUSION

Gorbachev, principally through *glasnost*, has made progress concerning human rights. This progress is evidenced by the release of political prisoners, relaxed censorship, and allowance of certain public demonstrations. Areas which have shown little or no progress concern minority and religious prisoners, and emigration. To the Western perception, the Soviet hard-line position is softening.

Reflecting on the developments regarding the fate of the liberalization experienced during the last year, it is reasonable to predict that there will be more progress on human rights in the coming months. In the longer term, one should not be euphoric about the prospects of *glasnost* in this area. If Gorbachev is trying to square the circle by undertaking the democratization of the Soviet system, as he shows every sign of doing, it is unlikely that he will perdure in control for many more years. As destiny would naturally have it, sooner or later the *nomenklatura* will most likely eject him. The result would be that *glasnost* would find itself bound to suffer in the unavoidable conservative response. What is crucial is that the longer term future depends overwhelmingly on Gorbachev's fate. If Gorbachev succeeds in promoting democratization and revitalizing the economy smoothly, without threatening the party's control, he will endure. Dissidents, believing that deception is the key word, claim that: 1) these changes were directed towards enticing Westerners to participate in a Moscow human rights conference, which would be furthered by the Soviet government; 2) the surfacing of good will by the Soviets will dematerialize as soon as an arms-control agreement has been completed; and, 3) the changes have been a skillful method of dealing with the dissidents, since these changes were directed more at pacifying than bolstering the dissent.[71] Andrei Sakharov believes otherwise, stating that "objectively something real is happening. How far it is going to go is a complicated question. But I myself have decided that the situation has changed."[72]

Western experts on the Soviet political scene feel that Gorbachev's striking courage, forceful personality, skills of persuasion, and unceasing

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70. Among those who have been permitted to leave during the last year are: Iosif Begun, David Goldfarb, Vladimir Feltsman, Georgi Mikhailov, and Lev Blitschtein.

71. N.Y. Times, Feb. 12, 1987, sec. 1, at 1, col. 1.

72. N.Y. Times, Feb. 9, 1987, sec. 1, at 1, col. 2. *See also* N.Y. Times, April 3, 1987, sec. 1, at 1, col. 1.

aggressiveness in keeping his opponents off balance, make him not only a awe-inspiring politician, but also the type individual who can pull the USSR out of a massive national crisis. In November 1987, Rozanne Ridgway, an assistant secretary of state, commented that Gorbachev has a "very firm grip" on the Soviet Union.[73] Others reporting on the last Party Congress feel that Gorbachev is a strong, long term leader, who will provide order and innovation.[74] On the other side of the prophesying coin, one finds Richard Owen, who is skeptical about the success of Gorbachev's reforms,[75] and Martin Walker who feels that Gorbachev will succeed only partially.[76] Standing in the forefront of successors to Gorbachev should he fail, is Yegor Ligachev, who has voiced serious reservations about *glasnost*, stressing the necessity for restraint.[77] Of course, these are merely predictions, but what is strongly evident is that if Gorbachev fails in his efforts and is subsequently ousted, his human rights policies will not only be swiftly, but also drastically reversed by his successors. One can only quote a cynical dissident when asked how far Gorbachev will go: "we shall see, we shall see."[78]

D. Mauritz Gustafson

73. Denver Post, Nov. 1, 1987, sec I, at 3.

74. *See* CRS 86, *supra* note 9 (report on the 27th Soviet Party Congress in February and March 1986).

75. *See* R. OWEN, COMRADE CHAIRMAN: SOVIET SUCCESSION AND THE RISE OF GORBACHEV (1987).

76. *See* M. WALKER, THE WALKING GIANT: GORBACHEV'S RUSSIA (1986).

77. Time, Oct. 5, 1987, at 40.

78. N.Y. Times, *supra* note 33.

BOOK REVIEW

The Right to Life in International Law

*Reviewed by W. Paul Gormley**

RAMCHARAN, B. G. (editor), Martinus Nijhoff, Dordrecht, (1985); $57.50 ISBN 90-247-3074-0, xii, 371 pp.

The most grievous violations of the fundamental rights of individuals - indeed of all mankind - become the focus of this excellent volume. The distinguished editor guided a group of contributors during an in-depth evaluation of the right to life as it currently exists in customary international law, and continues to be codified in major multinational conventions.[1] Nonetheless, the focus of this series of essays is placed on the future developments that will assure effective implementation of the right to life. Accordingly, this book reflects the philosophy of the editor, who seeks to enlarge the effective protection of human rights by means of an expanded and open-ended interpretation of existing treaty texts, as opposed to the traditional approach which tended to apply a restrictive interpretation toward human rights provisions that restrict absolute state sovereignty.

One of the book's main contributions is that a dynamic approach has been adopted for the purpose of expanding human rights protection. Admittedly, the question can be asked: "Has the tone of the volume become excessively dynamic or overly far-reaching in terms of current state practice"? Beyond question, the issues raised in this challenging text will be controversial throughout the remainder of this century, as dictatorships of the left and the right continue to arbitrarily deprive their citizens of fundamental rights and even their mere physical existence. "[W]hile maintaining a legal orientation in general, an effort has also been made to be dynamic, to view the right to life from all of its possible areas of appli-

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1. THE RIGHT TO LIFE IN INTERNATIONAL LAW (B. Ramcharan ed. 1983) [hereinafter cited as RIGHT TO LIFE]. The applicable treaty texts are reproduced in the Annexes, *id.* at 317 ff. *See generally*, B. Ramcharan, INTERNATIONAL LAW AND FACT FINDING IN THE FIELD OF HUMAN RIGHTS (1982).

cation, to examine the complex problems which this right encounters in practice, and to address existing or future needs."[2]

The influence, in fact leadership, of the editor is considerable; however, it would be incorrect to assume that the contributors have been unduly influenced. There are, accordingly, points of disagreement that appear among the various essays. In other words, authors "do their own thing." For example, the conservative approach is to classify human rights and fundamental guarantees into three distinct classes: 1) political and civil; 2) economic, social and cultural; plus 3) the newer solidarity rights (or human rights of the third cycle), because of the different standards of implementation and enforcement that have been perfected by regional and international organizations.[3] By way of contrast, the goal sought by action-oriented human rights lawyers is to abandon these classifications in order to employ the corpus of existing human guarantees to precise situations. In practice, the right to life (the primary civil and political right) incorporates the "right to living" (which consists primarily of economic guarantees). But as frequently demonstrated in the series of chapters, such philosophical differences do not hamper the emerging standards and implementation of human rights norms. Perhaps all persons of goodwill can avoid being entrapped by such philosophical controversies by devoting a greater portion of their efforts toward the practice, rather than the theory, of human rights law. This position is clarified in Chapter I, *The Concept and Dimensions of the Right to Life*,[4] which represents the synthesis, and offers the conclusions and recommendations of the project. Dr. Ramcharan brings together a number of diverse positions for the purpose of analysis, and, secondly, provides a workable and unified scheme of human rights protection. Consequently, Dr. Ramcharan assumes a law-making role when he advocates that human rights lawyers "must, therefore, of necessity be in the forefront of the discipline, charting new courses, breaking new ground, and establishing new models and methods."[5] He illuminates this approach to the future role that should be accepted by human rights lawyers by contending that: "If the international human rights lawyer is doing his job well, he has to be ahead of his colleagues in postulating new theories, in advocating the recognition of new norms and in advancing new forms of action for promotion and protecting human rights."[6]

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2. *Id.* at v.

3. Contra, Alston, *The Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 N.I.L.R. 307 (1982) (and the sources cited). While in sympathy with the objectives sought by a number of contributors, the reviewer feels compelled to concede the validity of the conservative approach by classifying political and social rights as a distinct group of legal rights when contrasted with social and economic guarantees, because of the different schemes of implementation and methods of enforcement.

4. RIGHT TO LIFE, *supra* note 1, at 1-32.

5. *Id.* at 1.

6. *Id.*

The position defended by the contributors is that the right to life is an imperative norm, a peremptory right, that is, *jus cogens*.[7] Precisely, the "right to life" is a norm of customary international law or a general principle of international law which transcends particular positions, as this right is codified in specific international conventions.[8] As a result of this interpretation of existing customary law, human rights lawyers are "not necessarily limited by the provisions of particular conventions or declarations, but must have recourse to the totality of the evidence and the practice available within the international community."[9]

The further innovation becomes the scope, or the outer limits, of the right to life. A restrictive interpretation of treaty texts, such as article 6 of the *International Covenant on Civil and Political Rights*,[10] article 2 of the *European Convention of Human Rights and Fundamental Freedoms*,[11] or article 4 of the *American Convention on Human Rights*,[12] is no longer applicable. Yet, two aspects of this right to life must be considered, as the contributors so aptly demonstrate. The mere physical existence of mankind must be assured as a norm of *jus cogens* from which states may not derogate, even during periods of extreme emergency and open warfare. Simultaneously, the "right to living" mandates that a minimum quality of life be maintained. Governments have a legal duty to provide minimum subsistence levels. Obviously, the problem of setting such levels must, necessarily, be determined in each case; yet the significant consideration is that governments are required "to pursue policies which are designed to ensure access to the means of survival for every individual within its country."[13]

Related subject matter areas, such as the right to peace, the right to survival, and the right to a safe environment are applicable. Environmental hazards must not be minimized, for the reason that the interrelationship between the right to live and the right to a pure and clean environment are inseparable. Not only is a strict duty imposed on states, but a legal obligation - a right *erga omnes* - is imposed on the international community. As a result, measures must be taken by international and re-

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7. The contributors assume that the imperative norm of *jus cogens* (and also rights *ergo omnes*) exist in customary international law and is applicable to the right to life. *E.g.*, RIGHT TO LIFE, *supra* note 1, at 14-15, 186-87, & 190. This position is supported by the reviewer; however, it must be conceded that a significant number of distinguished authors attempt to refute the existence of imperative norms. *See*, e.g., Weil, *Towards Relative Normativity in International Law?*, 47 AM. J. INT'L L. 413 (1983), and Schwarzenberger, *International Jus Cogens*, 43 TEX. L. REV. 455 (1965).

8. RIGHT TO LIFE, *supra* note 1, at 3.

9. *Id.*

10. *Adopted* Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16), 49 U.N. Doc. A/6136 (1966) (*entered into force* March 23, 1976).

11. E.T.S. No. 5 (1950); 213 U.N.T.S. 221.

12. Pact of San Jose, Costa Rica (*opened for signature* 22 Nov. 1969)(*entered into force* July 1978), O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 of 7 Jan. 1970; 9 I.L.M. 673 (1970).

13. RIGHT TO LIFE, *supra* note 1, at 6.

gional organizations to prevent those environmental defaults that endanger the lives of human beings. Here, then, one of the newer human rights becomes an essential phase of the larger safeguard for human life. All too obviously, uncontrolled pollution has the potential not only of destroying flora and fauna, but also mankind: it is man who has become the endangered species.[14]

Conversely, the right to life is not absolute: in certain clearly defined and limited circumstances, the state may legally take human life, and these "permissible deprivations" are clearly set forth within the texts of human rights conventions. But Dr. Ramcharan, relying on the text of article 4 of the *American Convention*, maintains that these "categories of exceptions are closed and that no derogation of the right to life is permissible outside of the permitted categories"[15] as a rule of customary international law. This restriction on the imposition of the death penalty is accepted within the orbit of the Organization of American States; however, is it valid to contend that other sovereigns are precluded from enacting legislation to apply the death penalty to additional crimes? As this review is being written, public pressure is mounting in the United States for the imposition of the death penalty for acts of espionage committed during peacetime. Presently, this crime carries the penalty of life imprisonment. At the moment, it is only possible to speculate as to whether Protocol Number 6 to the *European Convention of Human Rights*[16] and the *Draft Second Protocol to the International Covenant on Civil and Political Rights*[17] will be widely adopted by the High Contracting Parties.

Gross violations of human rights - such as torture, lack of a fair trial, disappearances of defendants, and executions during periods of emergency - have increased in severity during the past year. It appears that even graver deprivations of human freedom will occur in the final decade of this century. Accordingly, the lesson is clear: there is a desperate need for international cooperation and concerted action by the international community, within the framework of the United Nations. To achieve this objective, Dr. Ramcharan presents a thirty-seven point agenda for action, for example the reinforcement of *jus cogens*, the enactment of the right

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14. *Accord generally*, Gormley, HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION (1976).

15. RIGHT TO LIFE, *supra* note 1, at 21.

16. Protocol No. 6 to the *European Convention For the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*; *reproduced id.* at 343 - 45. Article 1 provides: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." And Article 3 stipulates: "No derogation from the provisions of the Protocol shall be made under Article 15 of the Convention." *See also, Explanatory Report on Protocol No. 6 to the Convention For the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*; *reproduced in* RIGHT TO LIFE, *supra* note 1, at 345-47.

17. *Draft Second Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. Doc. A/C.3/35/L.75, at 35; *reproduced in* RIGHT TO LIFE, *supra* note 1, at 348 - 50.

to life in national constitutions, the imposition of international criminal liability for gross violations, the duty to negotiate disarmament issues, etc.

Dr. F. Menghistu reexamines the basic definition of this concept in order to come to grips with the main elements comprising the right to living, i.e. its economic base.[18] Not by accident, the Ethiopian author approaches this problem as one of survival; consequently, he speaks of a human right to survival, namely the right to live. But this right involves more than a negative approach that will restrict arbitrary governmental acts; instead, a duty is placed on the state (and its organs) to provide the sustenance of life, primarily adequate nutrition and medical treatment. This economic side of the right to live brings together a number of other individual rights to deal with the mere survival of mankind, since 800,000,000 of the world's population face starvation. In addition, the newer rubric of human rights jurisprudence will also encompass some of the solidarity rights in that the international community has a duty to lend support. Indeed, one of the themes to emerge in most of the essays is the duty of the global community - as represented in the United Nations, its specialized agencies, plus regional institutions - to implement the right to living.

Yet the difficulty of implementing such a global guarantee will become all too obvious, owing to the package of rights and economic guarantees that will become relevant. Nonetheless, human beings will be protected when governments deal effectively with such matters as underdevelopment, socio-economic stagnation, and political instability.

It follows that the newer right to development assumes a special importance within the third world. Hence, Professor de Waart, in a thoughtful chapter,[19] deals with the very foundation of any "right to survival." Perhaps this right to development will go further in supporting the right to living than dealing exclusively with survival, for in his view, "a right to development may emerge as a right to protection by law against unintentional non-arbitrary creeping or passive deprivation of life resulting from natural or man-made disasters which endanger the fulfillment of basic needs."[20] Thus, international society will assume an accelerating role in dealing with natural or man-made disasters that cannot be adequately dealt with by states.

Professor C.K. Boyle deals directly with one of the book's underlying themes, *The Concept of Arbitrary Deprivation of Life*.[21] In fact, the con-

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18. Ch. III, *The Satisfaction of Survival Requirements*, RIGHT TO LIFE, *supra* note 1, at 63-83.

19. Ch. IV, *The Inter-Relationship Between the Right to Life and the Right to Development*, *id.* at 84-96. *See also*, THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL (R. Dupuy ed., 1979); Van Boven, *The Right to Development and Human Rights*, 28 REV. INT'L COMM'N JURISTS 49 (1982).

20. RIGHT TO LIFE, *supra* note 1, at 89.

21. Ch. X, *id.* at 221-83.

cept of "arbitrary" - to be contrasted with the legal taking of human life by a state - requires constant interpretation and reevaluation, because the term "arbitrary" is contained within international conventions. For instance, article 6 of the *Civil and Political Covenant* speaks of "arbitrary deprivation of life." As such, the issue becomes: "Have governmental authorities acted in an arbitrary fashion?" The issue of the arbitrary taking of life by state agencies, even if permitted by municipal law, must be reexamined in terms of regional and international criteria, guaranteeing the right to life. This is to say, considerable disagreement arose at the time these human rights conventions were negotiated, and compromises were required, which had the effect of weakening the original goals of the treaty drafters. Still, considerable insight is provided by the *travaux preatoires* of the treaty articles at issue, for the reason that these provisions have become general principles of international law and are also included within customary international law. The primary consideration is that the right to life is the foremost human right, upon which all other human rights (and social guarantees) depend. The point at issue becomes: "Which exceptions to this sacrosanct right are recognized under international rights law?" The death penalty, consequently, must be reexamined in terms of the subsequent evolution of international criteria.

Thus, the specialized topic, which continues to become ever more controversial, is that of capital punishment. Dr. Sapienza examines the *International Legal Standards on Capital Punishment*,[22] particularly from the perspective of future treaty commitments. Those international norms that ban or restrict the imposition of capital punishment become the main legal force restricting the right of governments to extinguish human life. The primary examples are to be found in treaty articles, e.g. article 6 of the *Civil and Political Covenant*, which does not outlaw, but restricts the imposition of the death penalty and provides post-sentencing relief, such as a pardon or commutation. However, the compromises that were reached during the drafting stage have weakened the commitment undertaken by states parties. It follows that protocols, when ratified, will abolish capital punishment, namely the *Sixth Optional Protocol to the European Convention of Human Rights* and the *Draft Second Optional Protocol to the Civil and Political Covenant*. Here, then, is the main thrust (along with possible changes in domestic legislation) to preserve human life at the global level, specifically a binding treaty commitment. The next stage is to provide, first, the machinery for international monitoring and, second, a means of enforcement, especially during periods of emergency or throughout a state of war, at which time governments are more inclined to disregard their international obligations.

The recommendation offered, which could also be utilized as the primary conclusion emerging from the series of studies, is that constant attempts to improve standard-setting, accompanied by supervisory struc-

22. Ch. XII, *id.* at 284-96.

tures, be intensified, in spite of the hesitancy on the part of states to restrict their freedom of action against their own nationals.

In looking toward the future, particularly the final decade of this century, the right to life, deemed to be *jus cogens*, peremptory, and a right *erga omnes*, must become the focus of United Nations efforts, and indeed the focal point of the U.N. Commission for Human Rights, as so eloquently espoused by Professor van Boven, who contends, and quite properly, that "The protection of human life and the prevention of killings could become one priority theme of the Commission in its future programme and in taking up concrete situations involving gross and consistent violations of human rights."[23] Therefore, Professor van Boven offers a number of precise recommendations, such as the designation of a special rapporteur to examine instances of deliberate taking of life. These far-reaching proposals should be evaluated in future studies that build upon the foundation laid in this outstanding book.

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23. *Id.*, Annex VII, 335, at 340. The right to life becomes a recognized rubric of human rights law, with the result that the literature continues to expand. *See* Desch, *The Concept and Dimensions of the Right to Life (as defined in International Standards and in International and Comparative Jurisprudence)*, 36 ÖSTERR. Z. ÖFFENTL RECHT UND VÖLKERRECHT 77 (1985) for a reexamination of the expanding concept. *See* Dr. Desch's discussion of the *Universal Declaration of Human Rights* 1981 (proclaimed by the Islamic Council to mark the anniversary of the 15th century of the Islamic era, Paris, 19 Sept. 1981), *id.* at 79 & n. 8 at 81-83.

See also van Aggelan, LE RÔLE DES ORGANISATIONS INTERNATIONALES DANS LA PROTECTION DU DROIT À LA VIE (1986).

The evolution of these rights, enunciated in the *Universal Declaration of Human Rights* (U.N. GAOR 3rd Sess. (I), U.N. Doc. A/810, 1984), including the right to life, is discussed in Gormley, *The Emerging Dimensions of Human Rights: Protection at the International and Regional Levels - The Common Standard of Mankind*, 17 BANARES (INDIA) L.J. 1 (1981). *Cf.* Okere, *The Protection of Human Rights In Africa and the African Charter on Human Rights, European and American Systems*, 6 HUMAN RTS. Q. 141 (1984).